TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1910.

No. [redacted]246

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ERASMUS L. MOTTLEY AND ANNIE F. MOTTLEY, HIS WIFE.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JUNE 14, 1909.

(21,722.)

(21,722.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 496.

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vs.

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IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from Warren circuit court	2	1
Caption	2	1
Petition	2	1
Summons	9	4
Return on summons	10	4
Demurrer to petition	10	5
Answer	11	5
Demurrer to answer	16	7
Filing of demurrer noted of record	16	8
Judgment	17	8
Clerk's certificate	18	8
Statement of appeal	20	9
Orders advancing appeal and submitting	21	9
Judgment	21	9
Opinion	23	10
Petition for writ of error	36	15
Assignment of errors	38	16
Writ of error	42	18
Order allowing writ	44	19
Writ of error bond	45	20
Citation and service	49	21
Clerk's certificate	50	21

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 19, 1909.

1 THE COMMONWEALTH OF KENTUCKY:

Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol at Frankfort, on the Fourth Day of May, A. D. 1909.

Be it remembered that the appellant by its attorney on the 13th day of March A. D. 1909, filed in the office of the Clerk of the Court of Appeals a transcript of the record herein, and which is in words and figures as follows, to-wit:

2 Be it remembered that, the following is a true, correct and complete transcript of the entire record of the cause late pending in the Warren Circuit Court, wherein Erasmus L. Mottley and Annie E. Mottley were plaintiffs and the Louisville & Nashville Railroad Company was defendant, as the same appears of record in my office. Pleas before the Hon. John M. Galloway, Judge.

The following is a copy of the petition filed in office on the 24th day of November, 1908:

Petition in Equity.

Warren Circuit Court, January Term, 1909.

ERASMUS L. MOTTLEY and ANNIE E. MOTTLEY, Plaintiffs,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

3 The plaintiffs, Erasmus L. Mottley and his wife, Annie E. Mottley, state that the defendant, the Louisville & Nashville Railroad Company, is a corporation created by, and existing under the laws of the State of Kentucky, and authorized to sue and be sued; that the said Louisville & Nashville Railroad Company is now and was at the time hereinafter set forth, a common carrier of freight and passengers; that on the 2nd day of October, 1871, it was such common carrier of freight and passengers, and owned and operated various lines of railroad extending through and across the State of Kentucky and thence into the State of Tennessee, and into and through several other States of the Union; that said Louisville & Nashville Railroad was at the time aforesaid, and now is, engaged in both intra-state and inter-state commerce and business as a common carrier.

The plaintiffs say that heretofore, to-wit: on September 7th, 1871, they and each of them were injured by reason of a collision of trains then owned, operated and controlled by said Company, at Randolph, in Kentucky; that said collission of said trains so operated by the defendant Company was caused by the gross carelessness and negligence of the agents and servants of the defendant, Louisville & Nashville Railroad Company, operating same; that at the time of said collision these plaintiffs were passengers upon one of said trains in said collis-

ion so owned and operated by the defendant company, and
4 were at the time en route from Bowling Green to Louisville, Kentucky, and paid said defendant Company the regular and customary charges for transportation from one of said points to the other; that the plaintiffs herein were dangerously and seriously and almost fatally injured by reason of said collision of said trains, were wounded, cut and torn by reason of the destruction of the cars in which they were seated at the time of the collision of said trains, and suffered great pain, both mentally and physically, by reason of the injuries so received by them and each of them, and they were disabled months after receiving said injuries; from attention to their ordinary business and occupation.

The plaintiffs say that after said collision of said trains, and after they, and each of them, had received the injuries aforesaid, they entered into a contract with the defendant, Louisville & Nashville Railroad Company, whereby it was contracted, stipulated and agreed between the plaintiffs herein on the one side, and said Company on the other, that in consideration of the fact that these plaintiffs would release said defendant Company from all damages or claim for damages for said injuries so received as aforesaid, said defendant, Railroad Company, agreed and obligated itself to issue passes on and over the roads of said defendant Company, and branches then existing or to exist, to the plaintiffs herein for the remainder of the year 1871, and thereafter to renew said passes annually during the lives of said Eramus L. Mottley and his wife, Annie E. Mottley or either of them.

5 Plaintiffs say that in pursuance to said contract and agreement and in consideration of the agreement of these plaintiffs each to release, said defendant Company did issue to each of these plaintiffs herein a pass over all of its lines of railroad wheresoever extended for the year 1871 and thereafter in January of each and every year since that time, in pursuance to said contract, it issued to the plaintiffs herein, and each of them, passes over all its lines of road and branches operated by it, up to January 1st, 1907. Up to said date the defendant Company has fully carried out and performed its said contract with these plaintiffs. Said contract of date October 2nd, 1871, was on that day reduced to writing by Russell Huston, the chief attorney for the defendant Company, and the same was duly signed by the defendant Company through its Vice-President, Thomas J. Martin, and same was acknowledged before the Clerk of the Jefferson County Court, and was recorded in the Clerk's office of said Court; said contract is in words and figures as follows, to-wit:

"Louisville & Nashville Railroad Company, Office of Attorney.

LOUISVILLE, KY., *Oct. 2nd.*, 1871.

Russell Houston, Attorney:

The Louisvile & Nashville Railroad Company in consideration that E. L. Mottley and wife, Annie E. Mottley, have this day re-
6 leased said Company from all damages or claims for damages for injuries received by them on the 7th day of September,

1871, in consequence of a collision of trains on the railroad of said Company at Randolph's Station, Jefferson County, Ky., hereby agrees to issue free passes on said railroad and branches now existing or to exist, to said E. L. Mottley and Annie E. Mottley for the remainder of the present year and thereafter to renew said passes annually during the lives of said Mottley and wife or either of them.

THOS. J. MARTIN,
For Louisville & Nashville Railroad Company.

[SEAL.] WILLIAM RANNEY, *Sec.*"

A copy of said contract is filed herewith as part hereof, marked exhibit No. 1.

Plaintiffs state that shortly prior to January 1, 1907, they applied to and demanded of the defendant that it issue to each of them passes over its entire railroad and branches for the year 1907, both its roads located and operated in Kentucky and those it owned and operated into and through other states, as defendant had theretofore done, and as it was bound and obligated to do by virtue of its contract and agreement aforesaid; but the defendant refused to issue such passes to plaintiffs, or either of them, for that year, or for any other period, but offered to issue passes to each of the plain-
7 tiffs for that year good between all stations on its lines of railroad in Kentucky alone, which plaintiffs refused to receive or accept from the defendant.

Thereupon plaintiffs instituted their bill in equity against the defendant in the Circuit Court of the United States for the Western District of Kentucky for a specific enforcement of the contract aforesaid, to which the defendant filed its general demurrer, which said Court in a written opinion overruled (150 Fed. 406) and upon defendant declining to plead further, said Court entered a decree in favor of the plaintiffs against the defendant as prayed for in their said bill.

From this decree the defendant appealed to the Supreme Court of the United States, which, on November 16, 1908, reversed the said decree of the lower Court, with instructions to the lower Court to dismiss said suit for want of jurisdiction (211 U. S. 31). The mandate of the Supreme Court of the United States has been issued and filed in the Court below, and the latter Court has in pursuance thereof entered a final order dismissing plaintiffs' said suit for want of jurisdiction.

Pending said appeal, however, the defendant, in accordance with the decree aforesaid, issued to each of the plaintiffs passes for the calendar years 1907 and 1908 over all its lines of railroad, both in and out of the State of Kentucky. But the plaintiffs state that on or about January 1, 1909, they again demanded of the defendant passes for each of plaintiffs in accordance with the provisions of said contract for the year 1909, good over defendant's system of
8 railroads, both in Kentucky and other States, where the same are located and operated by defendant, whereupon the defendant refused to issue to plaintiffs or other of them such passes for the current year or for any other period, but offered to issue to each of

them a pass over its lines of railroad in Kentucky for the year 1909, which plaintiffs declined to receive or accept.

Plaintiffs further say that said contract and agreement of the defendant Railroad Company to issue passes over its line of road and branches, as set forth in said written contract, was, and is, based upon a good and valuable consideration, in at least the sum of ten thousand ($10,000) dollars, paid by these plaintiffs in their said release to the defendant Company of all damages and claim for damages growing out of their said injuries, which injuries were occasioned the plaintiffs herein and each of them by the gross carelessness and negligence of the defendant Company and its agents and servants as aforesaid; that their rights under said contract to have passes issued are worth, and are of the value of five thousand dollars to each of the plaintiffs herein.

Wherefore, and for as much as the plaintiffs herein and each of them, are remediless in the premises, at and by the strict rule of the Common Law, and can have no relief only in a Court of Equity where matters of this nature are properly cognizable and reviewable, the plaintiffs pray that said defendant, Louisville & Nashville Railroad Company, be required, ordered and enjoined to specifically execute said contract with the plaintiffs and each of them; that it be required, ordered and enjoined to issue to these plaintiffs, and
9 each of them, passes over all its roads owned and operated by it, in and out of the State of Kentucky, for the year 1909, and for each and every year thereafter as long as the plaintiffs herein each shall live, pursuant to the contract herein, and for their costs herein expended, and for any other relief the plaintiffs may appear entitled to.

WRIGHT & McELROY AND
G. DUNCAN MILLIKEN,
Attorneys for Plaintiffs.

Upon the filing of the foregoing petition the following summons was issued from my office:

The Commonwealth of Kentucky to the Sheriff of Warren County, Greeting:

You are commanded to summon Louisville and Nashville Railroad Company to answer ten days after the service of this summons a petition filed in Equity against it in the Warren Circuit Court by Erasmus L. Mottley &c. and warn it, that upon failing to answer, the petition will be taken for confessed, or it will be proceeded against for contempt; and you will make due return of this summons within ten days after the service thereof to the Clerk of said Court.

Witness, W. H. Jones, Clerk of our said Court, this 24 day
10 of Nov., 1908.

W. H. JONES, *Clerk*.
By J. H. POTTER, *D. C.*

And the following return is indorsed thereon:
Executed on the Louisville & Nashville R. R. Co. by delivering to

E. H. Benzel, Chief agent for said Co. found in Warren Co. Nov. 24, '08.

F. Y. PATTERSON, JR., *S. W. C.*,
By T. J. HOLMAN, *D. C.*

The following is a copy of the demurrer filed in office on the 16 day of January, 1909:

Warren Circuit Court.

ERASMUS L. MOTTLEY and ANNIE E. MOTTLEY, His Wife, Plaintiffs,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Demurrer to Petition.

The defendant, Louisville & Nashville Railroad Company, demurs to the plaintiffs' petition because it does not state facts
11 sufficient to constitute or support a cause of action against it.

H. L. STONE,
SIMS, DU BOSE & RODES,
Attorneys for Defendant.

The following is a copy of the answer filed in office on the 16 day of January, 1909:

Warren Circuit Court.

ERASMUS L. MOTTLEY and ANNIE E. MOTTLEY, His Wife, Plaintiffs,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Answer.

The defendant, the Louisville & Nashville Railroad Company, for answer to plaintiffs' petition, or so much thereof as is deemed necessary, denies that from and after December 31, 1906, the plaintiffs, by virtue of the contract, the specific enforcement of which they seek in this suit, have been entitled to receive from the defendant free passes or any pass for the transportation of themselves or either of them, on or over the lines of railroad owned and operated
12 by the defendant, outside of the State of Kentucky, or extending from points into or through another State or States; or that the plaintiffs' alleged rights under said contract to have such passes issued are of the value of Five thousand dollars, or any other sum, to them or either of them.

The defendant states that the Congress of the United States by an act entitled "An act to amend an act entitled, 'an act to regulate commerce' and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29, 1906, provided that the provisions of said act shall apply to any Common Carrier * * * engaged in * * * the transportation of

passengers or property by railroad * * * from one State or Territory of the United States * * * to any other State or Territory of the United States.

The defendant states that it was on June 29, 1906, had been many years prior thereto, has been ever since that date, and is now a common carrier of passengers and property in the following States of the United States, viz: Kentucky, Ohio, Indiana, Illinois, Missouri, Tennessee, Virginia, North Carolina, Alabama, Georgia, Florida, Mississippi and Louisiana, and to and from points on its lines of railroad in each of said States to points on its lines of railroad in all others of said States, the system of railroad owned and operated by it therein being during said period and now over four thousand miles in length; and it was, therefore, on February 4, 1887, the date of the passage of the original Act of Congress to Regulate Commerce, has been ever since, and is now, a common
13 carrier by railroad, and subject to the provisions of said Act and the amendments thereto.

The defendant further states that by Section One (1) of said Act to regulate commerce, as amended June 29, 1906, it is provided:

"No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers."

Certain named classes are excepted from the operation of said prohibition by the further provisions of said section, but none of said excepted classes embraces the plaintiffs or any person with whom a contract for free interstate passes or free interstate transportation had been made by any common carrier by railroad subject to said Act prior to the passage of said Amendatory Act of June 29, 1906; and defendant states that the prohibition aforesaid abrogated, nullified and made void and of no effect all such contracts, including the one made October 2, 1871, between plaintiffs and defendant, and sought to be enforced herein, which on January 1, 1907, was no longer enforcible, and on and after that date any compliance with the terms thereof by the defendant or use of such passes by plaintiffs was and would have been unlawful and in violation of the following provision in said section:

"Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense on conviction, shall pay to the United States a penalty of not less than one hun-
14 dred nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty."

Furthermore, by Section six (6) of said Amendatory Act of June 29, 1906, which became effective August 28, 1906, it is provided:

"*No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published*

in accordance with the provisions of this Act; nor shall any carrier charge or demand or receive a greater or less or *different* compensation for such transportation of passengers or property, or for any service in connection therewith, *between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.*"

The defendant states that a violation of the provision last quoted and referred to is by the further provisions of the same section of said Act declared to be a misdemeanor, and the carrier, officer or agent guilty thereof is punishable therefor by a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense.

The defendant states that by reason of the provisions of the Act aforesaid it could not and can not now lawfully comply with the demand made by the plaintiffs for free passes for interstate transportation over its lines of railroad, and, therefore, refused and still refuses to issue the same to plaintiffs for the current year; and were such passes issued to them, the defendant could not lawfully receive or accept the same for such transportation, or any greater or less or *different* compensation therefor than the rates, fares and charges which are specified in its passenger tariffs filed with the Interstate Commerce Commission and in effect at the time, between points named therein, and which are charged and collected from all other interstate passengers on its lines of railroad.

Wherefore, the defendant prays that plaintiffs' petition be dismissed, and for all other proper relief.

HENRY L. STONE,
SIMS, DU BOSE & RODES,
Attorneys for Defendant.

The following is a copy of the demurrer to the answer filed in office on the 16 day of January, 1909:

Demurrer to Answer.

Warren Circuit Court, January Term, 1909.

ERASMUS L. MOTTLEY and ANNIE E. MOTTLEY, Plaintiffs,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

The plaintiffs, Erasmus L. Mottley and Annie E. Mottley, demur to defendant's answer, because it does not state facts sufficient to constitute a defense.

WRIGHT & McELROY AND
DUNCAN MILLIKEN,
Attorneys for Plaintiffs.

The following is a copy of an order entered in open Court on the 15th day of February, 1909:

Order.

Warren Circuit Court.

ERASMUS L. MOTTLEY and ANNIE E. MOTTLEY, Plaintiffs,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

It is ordered that the demurrer to the petition and the answer heretofore filed by the defendant in office be now filed of record.
17 It is further ordered that the demurrer heretofore filed by the plaintiffs to the answer, in office, be now filed of record.

The following is a copy of the judgment entered in open Court on the 15 day of February, 1909:

Judgment.

Warren Circuit Court.

ERASMUS L. MOTTLEY and ANNIE E. MOTTLEY, Plaintiffs,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

This cause having been submitted upon the demurrer of plaintiffs to defendant's answer and the Court being advised, it is adjudged that plaintiffs' demurrer to defendant's answer be sustained and the defendant refusing to plead further, it is adjudged that the defendant, Louisville & Nashville Railroad Company, issue a pass to the plaintiff, Erasmus L. Mottley, and to the plaintiff, Annie E. Mottley, upon and over all its lines of Railroad and its branches wheresoever extended for the remainder of the present year, 1909, and thereafter to renew said passes annually during the lives of said Erasmus L. Mottley and Annie E. Mottley or either of them.

To which judgment of the Court sustaining plaintiffs' demurrer to defendant's answer and to the entire judgment of the
18–19 Court, the defendant objects and excepts and prays an appeal to the Court of Appeals, which is granted.

STATE OF KENTUCKY,
County of Warren, set:

I, W. H. Jones, Clerk of the Warren Circuit Court, do certify that the foregoing 16 pages contain a true, correct and complete transcript of the entire record of the cause late pending in this Court, wherein Erasmus L. Mottley and Annie E. Mottley were plaintiffs

and the Louisville & Nashville Railroad Company was defendant, as same appears of record in my office.

Given under my hand, this 25th day of February, 1909.

W. H. JONES, *Clerk,*
By —— ——, *D. C.*

20 And with said transcript there was filed a statement, which is in words and figures as follows towit:

Statement of Attorney- for Appellant.

Louisville and Nashville Railroad Company, Appellant.

Erasmus L. Mottley, and Annie E. Mottley, Appellee-.

Henry L. Stone and Sims, Du Bose and Rodes, Attorneys for Appellant.

Wright and McElroy and Duncan Millikin, Attorneys for Appellee-.

The judgment appealed from was rendered on the 15th day of February, 1909, at the February term of the Warren Circuit Court and is found on page 14 of this record.

No summons is desired.

HENRY L. STONE,
SIMS, DU BOSE AND RODES,
Attorneys for Appellant.

21 Be it remembered that at a Court of Appeals held at the Capitol at Frankfort on the 15th day of April 1909, the following order was entered towit:

Warren.

L. AND N. R. R. Co.
v.
MOTTLEY, etc.

Came appellant by counsel and filed Notice and statement and moved the court to advance this case which motion is submitted.

Be it remembered that at a Court of Appeals held at the Capitol at Frankfort on the 16th day of April 1909, the following order was entered towit:

Warren.

L. AND N. R. R. Co.
v.
MOTTLEY, etc.

The Court being sufficiently advised appellant's motion to advance this case for decision is sustained, and case ordered submitted.

Be it remembered that a Court of Appeals held at the Capitol at Frankfort on the 4th day of May 1909, the following judgment was entered towit:

Appeal from Warren Circuit Court.

LOUISVILLE AND NASHVILLE R. R. Co., Appellant,
v.
ERASMUS L. MOTTLEY, etc., Appellee.

The Court being sufficiently advised it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, which is ordered certified to said Court.

It is further considered that the appellees recover of the appellant their cost herein expended.

22 And on said date the Court delivered the following opinion: Which is in words and figures as follows towit:

23 Court of Appeals of Kentucky.

Appeal from Warren Circuit Court.

LOUISVLLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
ERASMUS L. MOTTLEY, &c., Appellees.

Opinion of the Court by Judge Barker, Affirming.

In 1871 the appellees, Erasmus L. Mottley and Annie E. Mottley, his wife, were seriously injured in an accident occurring to one of appellant's passenger trains while they were being transported as passengers from their home, in Bowling Green, to Louisville, Kentucky. In full settlement of all claim for damages on the part of the appellees, the appellant agreed, in writing, to furnish them free transportation over its line for the remainder of their lives. The contract is as follows:

24 "LOUISVILLE, KY., *Oct.* 2, 1871.

"The Louisville & Nashville Railroad Company, in consideration that E. L. Mottley and wife, Annie E. Mottley, have this day released said company from all damages or claims for damages for injuries received by them on the 7th of September, 1871, in consequence of a collision of trains on the road of said company at Randolph's Station, Jefferson County, Ky., hereby agrees to issue free passes on said railroad and branches, now existing or to exist, to said E. L. Mottley and wife, Annie E. Mottley, for the remainder of the present year and thereafter to renew said passes annually during the lives of said Mottley and wife, or either of them.

"THOS. J. MARTIN,
"*Vice President Louisville & Nashville Railroad Company.*
[SEAL.] "WILLIS RANEY, *Secretary.*"

This contract was faithfully carried out by the appellant until after the enactment by the Congress of the United States, on June 29th, 1906, of "An Act to amend an Act, entitled an Act to regulate commerce, approved February 4, 1887," when, becoming apprehensive lest the further issuance of passes to appellees under the contract was within the prohibition of the Act of Congress, it declined to carry out its agreement any further; whereupon the appellees first instituted an action for the specific enforcement of the contract in the Circuit Court of the United States for the Western District
25 of Kentucky, where a judgment was rendered as prayed for in the petition. (Mottley *v.* L. & N. R. R. Co., 150 Fed. Rep 406.) But upon appeal to the Supreme Court of the United States, this judgment was reversed upon the ground of want of jurisdiction in the federal court to entertain the cause of action. (See L. & N. R. R. Co. *v.* Mottley, 211 U. S., 149.) Whereupon the appellees instituted this action in the Warren circuit court, with the result that a judgment was rendered requiring the appellant to perform the contract. To review this judgment this appeal has been prosecuted.

The Louisville & Nashville Railroad Company is a common carrier engaged in the business of interstate and intrastate commerce, and the specific performance of the contract in question involves both interstate and intrastate commerce; therefore, one of the questions arising upon this record is, whether or not the contract is specifically enforcible under the provisions of the Act of Congress before referred to, and which is fully pleaded and relied upon by the appellant as a bar to appellees' cause of action. So much of the federal statute pleaded by the appellant as is deemed necessary to be herein set forth is as follows:

"SECTION 1. * * * No common carrier, subject to the provisions of this Act shall, after January 1st, 1907, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees."

"SECTION 6. * * * No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation
26 of passengers, or property, as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of the Act; nor shall any carrier charge, or demand, or collect, or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner, or by any device, any portion of the fares, rates and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. * * * "

The violation of these sections of the statute is punishable by heavy fine.

No question of the good faith of the parties in making the contract is raised, and the length of time it has existed prior to the enactment

of the federal statute precludes the possibility of any intent to evade its provisions. The first question, then, arising upon the record is whether or not the Congress, in the enactment of the statute, intended to abrogate existing contracts such as the one in question—in other words, whether the statute was intended to be retroactive in its effect on pre-existing contracts, or whether it was intended to be prospective in its effect; and, second, whether or not the contract in ques-
27 tion is within the purview of the federal statute at all.

The rule is well settled, that statutes will always be construed to be prospective, and not retrospective in their effect, unless the language so plainly expresses a retrospective intent as to preclude a reasonable doubt that the legislature meant it to be prospective. Cooley, in his work on Constitutional Limitations, in speaking of this rule of construction (p. 529), says: "Nevertheless, legislation of this character is exceedingly liable to abuse; and it is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively." And Endlich, in his work on the Interpretation of Statutes (§ 271), uses this language: "Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. * * * They are construed as operating only on cases of facts which come into existence after the statutes were passed, unless a retrospective effect be clearly intended." There is nothing in the language of the enactment by Congress, under discussion, which purports to give a retrospective effect to its operation; on the contrary, the intent that the statute should have a prospective effect only appears from a most cursory reading of the language used, unless it is applied to the actual issuance of the passes and not to the contract under which they are issued. We do not think it admissible to so construe the language of the statute as to hold that it applies simply to the issuance of a pass or ticket for transportation, rather
28 than the contract under which the pass is issued. It is true that, in the execution of the contract made in 1871, it has been the custom of the railroad company to issue passes to the appellees annually, and, therefore, if we fix our attention exclusively upon this annual issuance of tickets for transportation, it might seem that these fall within the letter of the statute because they are actually issued since the enactment; but this narrow view of the matter is inadmissible. The passes or tickets actually issued are in execution of the contract made in 1871, and unless this contract is invalidated by the statute, its language can not be applied to the mere issuance of the tickets. If the contract remains legally in force, the means by which it is executed can not be invalid or illegal.

Passing now to the second question, we are of opinion that the contract between the appellant and the appellees does not fall at all within the meaning of the language used in the statute. The statute inhibits the issuance by common carriers doing interstate commerce of free tickets or passes for transportation, except to employés. The tickets or passes issued to the appellees in execution of the contract can not in any real sense be called free. They are paid for in money,

just as certainly as if the actual cash was handed over to the agent of the railroad by the appellees in payment for a trip ticket. The appellees had received serious bodily injuries caused by the negligence of the railroad, and the latter was liable to them for damages, which, unless the matter was settled amicably, would have to be liquidated by the verdict of a jury and the judgment of a court. It was entirely competent for the parties thus standing towards each other to settle this unliquidated claim or demand for money
29 and agree upon its value. They did so, and it was stipulated that the amount of damages suffered by appellees was equal in value to such transportation as they should afterwards choose to make over its line during their natural lives. At the time this agreement was made, it was entirely legal and valid, and, as said before, it was made in absolute good faith by the parties. Now, suppose, instead of carrying out the contract in the manner adopted, the railroad had agreed that it was liable to appellees for the sum of ten thousand dollars, and had paid over to them that sum, and then appellees had chosen, as they might have done, to hand back the amount received, and thus purchased from the railroad with actual cash transportation for life; would tickets issued under this agreement be called free tickets, or free passes? We think not. And yet it would be difficult to find a difference in principle between the contract actually made and that supposed. It does not require more than a slight investigation to reach the conclusion that the contract made by the parties was very much to the advantage of the railroad as against the payment by it of such sum as the jury might assess in actual cash if the matter had progressed to a judgment for damages.

It may be admitted, for the purposes of this case, that Congress could have framed the statute so as to abrogate the contract under discussion. There is no constitutional inhibition upon Congress passing laws to impair the obligation of contracts as there is against the States passing such laws; but the same moral obligation against such unjust laws rests upon the general government as upon the State government, and we must presume that the general government never intends to impair the obligation of existing con-
30 tracts unless an imperative necessity exists for so doing, and a clear intent to do so is expressed.

It would be a great hardship upon appellees to invalidate the contract between them and appellant. The time has long since past, under the operation of the statute of limitations, when they could institute or maintain an action against the railroad for the injuries received by them in 1871; so that if the contract is invalidated now, they would lose absolutely what remaining value it has. This property right will be taken from them without any consideration. And we would be justified in reaching the conclusion that Congress intended to invalidate the contract and thus take from appellees their property rights without remuneration only because the language used precludes any other construction.

In the case of United States *v.* Kirby, 74 U. S. 486-7, the Supreme Court said:

"All laws should receive a sensible construction. General terms

should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will also, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of that character. The reason of the law in such cases should prevail over the letter."

In the case of Carlisle *v.* United States, 16 Wall. 153, the rule is thus stated:

31 "All general terms in the statutes should be limited in their application, so as not to lead to injustice, oppression or unconstitutional operation, if that be possible. It will be presumed that the exceptions were intended which would avoid results of that character."

And in Market Co. *v.* Hoffman, 101 U. S. 116, it was said:

"In Brewer's Lessee *v.* Bloucher (14 Pet., 78) it was said to be the undoubted duty of the court to ascertain the meaning of the legislature, from the words used in the statute and the subject-matter to which it related, and to restrain its operation within narrower limits than its words import, if the court is satisfied that the literal meaning of the language would extend to cases which the legislature never designed to include in it."

(See, also, Chew Heong *v.* United States, 112 U. S. 555; Holy Trinity Church *v.* United States, 143 U. S. 457; Bate Refrigerator Co. *v.* Sulzberger, 157 U. S. 37.)

As we have said before, the very case we have here was decided in the Circuit Court of the United States for the Western District of Kentucky, in favor of the appellees. (Mottley *v.* L. & N. R. R. Co., *supra.*) It is true, the judgment was reversed by the Supreme Court of the United States because of want of jurisdiction in the federal court to entertain the cause of action set up by appellees; but we think the painstaking and thorough opinion rendered by the learned federal judge upon the merits of the case is very instructive, and we rely upon it with confidence.

32 Nor are we unmindful of the opinions in Southern Wire Co. *v.* St. Louis Bridge & Tunnel R'y Co., 38 Mo. App. 191, and Fitzgerald *v.* Grand Trunk R. Co. (Vt.), 22 Atl. 76-77, which hold that existing traffic contracts discriminating as to rates between shippers were repealed by the interstate commerce act of 1887. The opinions in these cases rest, in part, at least, upon the fact that the discriminating contracts by common carriers between their patrons were illegal at the common law, and could not be upheld in any event. But without examining this phase of the case too minutely, it is sufficient to say that, in our opinion, they can be distinguished from that at bar. Those contracts were wholly executory, and fell within the precise reason for the enactment of the act of Congress prohibiting discrimination in interstate commerce. In the case at bar the appellees' part of the contract was entirely executed. They had paid over to the railroad company the whole consideration moving from them for the contract. To annul this contract now would be to confiscate the consideration paid by them. Nor was that contract in anywise illegal or questionable at the time it was made. On the contrary, as we understand it, it was entirely legal

and valid. There is nothing in this record to show that the contract in anywise discriminates in favor of appellees. On the contrary, we think it highly probable that they pay for their railroad transportation under its terms a very much larger sum in money than the ordinary passengers do. In other words, judging from ordinary experience in such cases, where neither the liability nor the extent of the damages is questioned, we think it more than probable that the verdict appellees would have received at the hands of a jury, if invested would produce a sum which would more
33 than pay for the transportation which they actually receive under the contract. Of course, this is somewhat problematical, but, as the railroad thought it was to its interest to make the contract, we cannot believe that our supposition is overstrained.

For these reasons, we are of the opinion that the contract under discussion does not fall within the terms of the federal statute, and that the judgment of the trial court should be affirmed, and it is so ordered.

34 On the back of the opinion appear the following indorsements:

Louisville & Nashville Railroad Company *vs.* Erasmus L. Mottley, &c. Opinion by Barker, J. 1909, May 4: *Affirmed.* Henry L. Stone, Sims, DuBose and Rodes, for Appellant. Clarence U. McElroy, Wright and McElroy, G. Duncan Milliken, for Appellees. Warren.

35 Be it remembered that on the 2nd day of June 1909, there was filed in the office of the clerk of the Court of Appeals a Petition for a Writ of Error, and which is hereto attached and is as follows:

36 Court of Appeals of Kentucky,

Louisville & Nashville Railroad Company, Appellant,
vs.
Erasmus L. Mottley, and Annie E. Mottley, His Wife, Appellees.

Petition for Writ of Error.

To the Honorable Warner E. Settle, Chief Justice of the Court of Appeals of Kentucky:

The Louisville & Nashville Railroad Company, appellant in the above entitled cause in the Court of Appeals of Kentucky, hereby petitions for the allowance of a writ of error from the Supreme Court of the United States to the Court of Appeals of Kentucky in order that the judgment of the latter Court, rendered in said cause on May 4, 1909, may be reviewed and examined by the Supreme Court of the United States, and reversed, if found to be erroneous. The grounds of this application are set forth in the Assignment of Errors presented and filed herewith, it being claimed by your peti-

tioner in the Warren Circuit Court and in the Court of Appeals of Kentucky that the contract sued on in said cause was, prior to the commencement of said cause, abrogated, nullified, and compliance therewith, on and after January 1, 1907, was made unlawful and the obligations thereof rendered unenforcible by the provisions of the Act of Congress, entitled "An Act to Regulate Commerce," approved February 4, 1887, as amended June 29, 1906, which claim was, by the judgments of the said Circuit Court and the Court of Appeals of Kentucky in said cause, denied.

HENRY L. STONE,
Counsel for Louisville & Nashville Railroad Company.

Filed June 2, 1909.
NAPIER ADAMS, *C. C. A.*

37 And on said date there was filed in the office of the Clerk of the Court of Appeals an Assignment of Errors, and which is hereto attached as follows:—

38 Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
vs.
ERASMUS L. MOTTLEY and ANNIE E. MOTTLEY, His Wife,
Defendants in Error.

Assignment of Errors.

The Plaintiff in Error, the Louisville & Nashville Railroad Company, assigns as errors in the judgment of the Court of Appeals of Kentucky, rendered May 4, 1909, herein complained of, in the cause pending in that Court of said Company, appellant, against Erasmus L. Mottley and Annie E. Mottley, his wife, appellees, the following, to-wit:

I.

The Court of Appeals of Kentucky erred in affirming the judgment of the Warren Circuit Court in sustaining the appellees' demurrer to the appellant's answer.

II.

In holding that the contract between appellees and appellant, dated October 2, 1871, the specific performance of which was prayed for by appellees, is valid or binding in law on appellant, with respect to interstate transportation of appellees over the railroads of appellant, since the Act of Congress to amend "The Act to Regulate Commerce," approved June 29, 1906, went into force and effect.

III.

In ruling that, under said contract, appellees were and are lawfully entitled to receive from appellant, during their lives, interstate

transportation free or without charge, or without the payment
39 of money at regular rates therefor, and to use the same over all or any of the lines of railroad owned or operated by appellant, as a common carrier of passengers, from one State to another or other States of the United States, and that appellant, by said contract, was and is lawfully bound to grant for the year 1909, and annually thereafter, at the beginning of each year, such transportation to appellees as long as they or either of them live, notwithstanding the provisions of Section One (1) of said Act, as amended, forbidding the issuance of such transportation free or without charge to any person on or after January 1, 1907, except those belonging to certain classes, to none of which appellees belong.

IV.

In decreeing the specific enforcement of said contract od October 2, 1871, with respect to interstate transportation and that appellant from year to year must furnish the same to appellees as long as they live, although the provisions of Section Six (6) of said Act as amended, which took effect August 28, 1906, expressly prohibits, under heavy penalties, the appellant as such common carrier from charging, demanding, collecting, or receiving, a greater or less or different compensation for such transportation of passengers, or for any service in connection therewith, between the points named in appellant's tariffs published and filed with the Interstate Commerce Commission, in accordance with the provisions of said Act.

V.

In ruling that the contract sued on had not been abrogated or nullified so far as the same concerned the interstate transportation of appellees over appellant's lines of railroad on and after January 1, 1907, by the provisions of the Act of Congress, approved June 29, 1906, amending the Act to Regulate Commerce, such con-
40 tracts not having been thereby excepted from the operation of those provisions.

VI.

In ruling that appellees were entitled to any relief whatever against appellant by virtue of the contract sued on on account of appellant's refusal to issue to them interstate transportation for the year 1909, or any subsequent year during their lives.

VII.

In not holding that the Warren Circuit Court erred in not carrying appellees' demurrer to appellant's answer back to appellees' petition, and in not sustaining the same thereto, and in not reversing the judgment of said Circuit Court appealed from, with direction to dismiss appellees' petition.

HENRY L. STONE,
Counsel for Plaintiff in Error.

Filed Jun- 2, 1909.
NAPIER ADAMS, *C. C. A.*
3—496

41 And on said date there was filed in the office of the Clerk of the Court of Appeals a Writ of Error from the Supreme Court of the United States, and the order allowing same and which are hereto attached, and which are as follows:

42 Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,

vs.

ERASMUS L. MOTTLEY and ANNIE E. MOTTLEY, His Wife, Defendants in Error.

Writ of Error.

UNITED STATES OF AMERICA,
Eastern District of Kentucky, Sixth Judicial Circuit:

The President of the United States to the Honorable Judges of the Court of Appeals of Kentucky, Greeting:

Because *of* the record and proceedings, as also in the rendition of the judgment, of a plea *to* which is in the said Court of Appeals of the State of Kentucky, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit between the Louisville & Nashville Railroad Company, Appellant, and Erasmus L. Mottley and Annie E. Mottley, his wife, Appellees, wherein was drawn in question the construction of a Statute of the United States, viz: The Act to Regulate Commerce as amended June 29, 1906, as applicable to and bearing upon the validity and enforcibility of the contract sued on, and the decision was against the right, privilege, or exemption specially set up or claimed, under the provisions of the Statute aforesaid, a manifest error hath happened, to the great damage of the said Louisville & Nashville Railroad Company, the plaintiff in error, as by its complaint appears, we being willing that error, if any hath been,
43 should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under Your Seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington, in the District of Columbia, thirty days after the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Su-

preme Court of the United States, this the 2d day of June in the year of Our Lord, 1909.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

CHAS. N. WIARD,
Clerk of the Circuit Court of the United States for the Eastern District of Kentucky, at Frankfort.

Allowed by

W. E. SETTLE,
Chief Justice of the Court of Appeals of Kentucky.

Filed Jun- 2, 1909.

NAPIER ADAMS, *C. C. A.*

44 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
ERASMUS L. MOTTLEY and ANNIE E. MOTTLEY, His Wife, Appellees.

Order on Petition for Writ of Error.

The Appellant, the Louisville & Nashville Railroad Company, having this day applied for a writ of error from the Supreme Court of the United States to the Court of Appeals of Kentucky, to the end that the former Court review, examine, and reverse the judgment of the latter Court, entered May 4, 1909, in the above entitled cause, and having presented and filed its Assignment of Errors and a Writ of Error bond, which bond has been duly approved:

It is now ordered that such Writ of Error be allowed, and that a transcript of the record and proceedings, upon which said judgment was entered, duly authenticated, be sent to the Supreme Court of the United States, as prescribed by law.

This 2 day of June, 1909.

W. E. SETTLE,
Chief Justice of the Court of Appeals of Kentucky.

Filed Jun- 2, 1909.

NAPIER ADAMS, *C. C. A.*

45 And on said date there was filed in the office of the Clerk of the Court of Appeals, a Writ of Error Bond, and which is in words and figures as follows towit:

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
vs.
ERASMUS L. MOTTLEY and ANNIE E. MOTTLEY, His Wife,
Defendants in Error.

Bond on Writ of Error.

Know All Men by these Presents: That we, Henry L. Stone and William G. Dearing, of the County of Jefferson, State of Kentucky, are held and firmly bound unto Erasmus C. Mottley and Annie E. Mottley, his wife, in the sum of Three Hundred Dollars, ($300.00), to be paid to them, and we bind ourselves and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 31st day of May, 1909.

Whereas, the appellant Louisville & Nashville Railroad Company in the above styled suit has prosecuted a writ of error from the Supreme Court of the United States to the Court of Appeals of Kentucky, to reverse the judgment rendered and entered in said cause in the latter Court on the 4th day of May, 1909:

Now, therefore, the condition of this obligation is such that
46 if the said plaintiff in error shall prosecute said writ of error and answer all costs if it fails to make said writ of error good, then this obligation shall be void; otherwise to remain in full force and virtue.

HENRY L. STONE. [SEAL.]
WILLIAM G. DEARING. [SEAL.]

Sealed and delivered in presence of
B. J. SANDMAN.
H. C. McLELLEN.

STATE OF KENTUCKY,
Jefferson County, set:

Henry L. Stone and William G. Dearing, sureties named in the foregoing bond, being first duly sworn, each for himself says:

That he is a resident and freeholder in the County and State aforesaid, and is worth the sum of Three Hundred Dollars, ($300.00) over and above all his just debts and liabilities, exclusive of property exempt from execution.

HENRY L. STONE.
WILLIAM G. DEARING.

47 Subscribed and sworn to before me, as witness my hand and official seal, this the 31st day of May, 1909.

My commission expires on the 29th day of January, 1910.

[SEAL.] G. W. B. OLMSTEAD,
Notary Public, Jefferson County, Ky.

The foregoing bond is approved, this the 2nd day of June, 1909.

W. E. SETTLE,
Chief Justice of the Court of Appeals of Kentucky.

48 And on said date there was filed in the office of the Clerk of the Court of Appeals, the original Citation, with proof of service endorsed thereon, and which is attached hereto as follows:

49 Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
vs.
ERASMUS L. MOTTLEY and ANNIE E. MOTTLEY, His Wife,
Defendants in Error.

Citation.

UNITED STATES OF AMERICA,
Eastern District of Kentucky, Sixth Judicial Circuit:

To Erasmus L. Mottley and Annie E. Mottley, his wife, Greeting:

You are hereby cited and admonished to be and appear at a Session of the Supreme Court of the United States, to be holden at the City of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to a writ of error allowed and filed in the Clerk's Office of the Court of Appeals of Kentucky, wherein the Louisville & Nashville Railroad Company is Plaintiff in Error, and you are Defendants in Error, to show cause, if any there be, why the judgment rendered against said Plaintiff in Error, as in said Writ of Error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 2d day of June, 1909.

W. E. SETTLE,
Chief Justice of the Court of Appeals of Kentucky.

Filed Jun- 2, 1909.
NAPIER ADAMS, *C. C. A.*

[Endorsed:] We accept service of this citation June 8", 1909. G. Duncan Milliken, Wright & McElroy, Attorneys for Erasmus L. Mottley & his wife Annie E. Mottley.

50 THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals, set:

In obedience to the command of the attached Writ of Error, I, Napier Adams, Clerk of the Court of Appeals of Kentucky, hereby transmit to the Supreme Court of the United States, a complete copy of the entire transcript in the case of the Louisville and Nashville Railroad Company *versus* Erasmus L. Motley, etc., with all things

concerning the same, as the same appears from the records and files of my office.

In testimony whereof, I have hereunto set my hand and affixed my official seal. Done at the Capitol at Frankfort, this the 2 day of June, A. D. 1909.

[Seal Kentucky Court of Appeals.]

NAPIER ADAMS,
Clerk, Court of Appeals of Kentucky.

Endorsed on cover: File No. 21,722. Kentucky court of appeals. Term No. 496. The Louisville & Nashville Railroad Company, plaintiff in error, *vs.* Erasmus L. Mottley and Annie E. Mottley, his wife. Filed June 14th, 1909. File No. 21,722.

FILED.
OCT 12 1909
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. [redacted]246

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

ERASMUS L. MOTTLEY AND ANNIE E. MOTTLEY,
HIS WIFE, DEFENDANTS IN ERROR.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

NOTICE, MOTION, AND GROUNDS OF PLAINTIFF IN ERROR TO ADVANCE FOR HEARING.

HENRY L. STONE,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 496.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

ERASMUS L. MOTTLEY AND ANNIE E. MOTTLEY,
HIS WIFE, DEFENDANTS IN ERROR.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

NOTICE.

To Messrs. Wright & McElroy and G. Duncan Milliken, Counsel for Defendants in Error:

Please take notice that I shall make a motion for plaintiff in error in the above-styled case before the court at the opening of its session on Tuesday, October 12, 1909, or as soon thereafter as counsel can be heard, to advance the above-styled case for hearing at the present term at such time as the court may direct, and in support of said motion will file

and present to the court at the hearing of said motion the grounds therefor, a copy of which motion and grounds is herewith served upon you, dated October 8, 1909.

HENRY L. STONE,
Counsel for Plaintiff in Error.

Service of above notice is accepted and the motion to advance assented to, this October 9th, 1909.

WRIGHT & MCELROY,
G. DUNCAN MILLIKEN,
Counsel for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 496.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Plaintiff in Error,*

vs.

ERASMUS L. MOTTLEY and ANNIE E. MOTTLEY, His Wife, *Defendants in Error.*

Error to the Court of Appeals of the State of Kentucky.

Motion and Grounds to Advance for Hearing.

And now comes the plaintiff in error and moves the court to advance this case for hearing at the present term, on the following grounds, to-wit:

1. This case was brought in equity by defendants in error in the Warren Circuit Court, State of Kentucky, to compel the specific performance of the following contract made and executed between them and plaintiff in error:

"LOUISVILLE, KY., *Oct.* 2, 1871.

"The Louisville & Nashville Railroad Company, in consideration that E. L. Mottley and wife, Annie E. Mottley, have this day released said company from all damages or claim for damages for injuries received by them on the 7th of September, 1871, in consequence of a collision of trains on the railroad of said company at Randolph's Station, Jefferson County, Ky., hereby agrees to issue free passes on said railroad and branches now existing or to exist, to said E. L. Mottley and Annie E. Mottley for the remainder of the

present year, and thereafter to renew said passes annually during the lives of said Mottley and wife, or either of them.

"THOS. J. MARTIN, *Vice-President*,
"For LOUISVILLE & NASHVILLE RAILROAD COMPANY.

[SEAL.] "WILLIS RANNEY, *Secretary*."

This contract was complied with by plaintiff in error until January 1, 1907, and then it refused further compliance because of the provisions of the amendatory act of Congress to regulate commerce, approved June 29, 1906, which (1) by section 1 prohibits, on or after January 1, 1907, a common carrier by railroad, engaged in the transportation of passengers or property from one State to another, such as plaintiff in error, from issuing free interstate transportation, and (2) by section 6 prohibits, on or after August 28, 1906, when said act took effect, such carrier from receiving a greater or less or *different* compensation for such transportation of passengers between the points named in such carrier's tariffs published and filed with the Interstate Commerce Commission, in accordance with the provisions of said act, than the rates, fares, and charges specified therein.

2. Defendants in error contend that said act to regulate commerce does not apply to contracts made prior to its passage and approval, but, if it does, it is unconstitutional, because it deprives them of their property without due process of law, while, on the other hand, plaintiff in error insists that said act applies to all such contracts in conflict with its said provisions, whether executed before or after the taking effect of said act, and that said application does not render said act unconstitutional, it being within the power of Congress to so regulate commerce among the States as to impair the obligation of prior contracts respecting such commerce.

3. The said circuit court below ruled that the contract aforesaid had not been abrogated or nullified by said act

of Congress, although not excepted from its operation, and decreed its specific enforcement. From this decree plaintiff in error appealed to the Court of Appeals, the highest court of the State of Kentucky, which affirmed the decree appealed from, May 4, 1909. (Record, p. 10; Louisville & Nashville Railroad Co. *v.* Mottley *et al.*, 118 S. W., 982.)

4. The Interstate Commerce Commission and many courts have ruled otherwise concerning such contracts, and as the common carriers subject to the provisions of said act have made a large number of similar contracts as to interstate transportation of both freight and passengers and are uncertain whether they are still in force or not, it is exceedingly important to all of them, to the said Commission whose duty it is to enforce the provisions of said act, to those holding such contracts with such carriers, and to the public at large to have the questions involved herein promptly and finally determined by this court.

5. The courts below decreed the specific performance of said contract, and that plaintiff in error should issue to defendants in error passes for interstate transportation, good over all or any of the lines of railroad owned or operated by plaintiff in error as a common carrier of passengers from one State to another State or other States of the United States for the year 1907, and annually thereafter, at the beginning of each year, as long as they or either of them lived. This writ of error is prosecuted to reverse that decree.

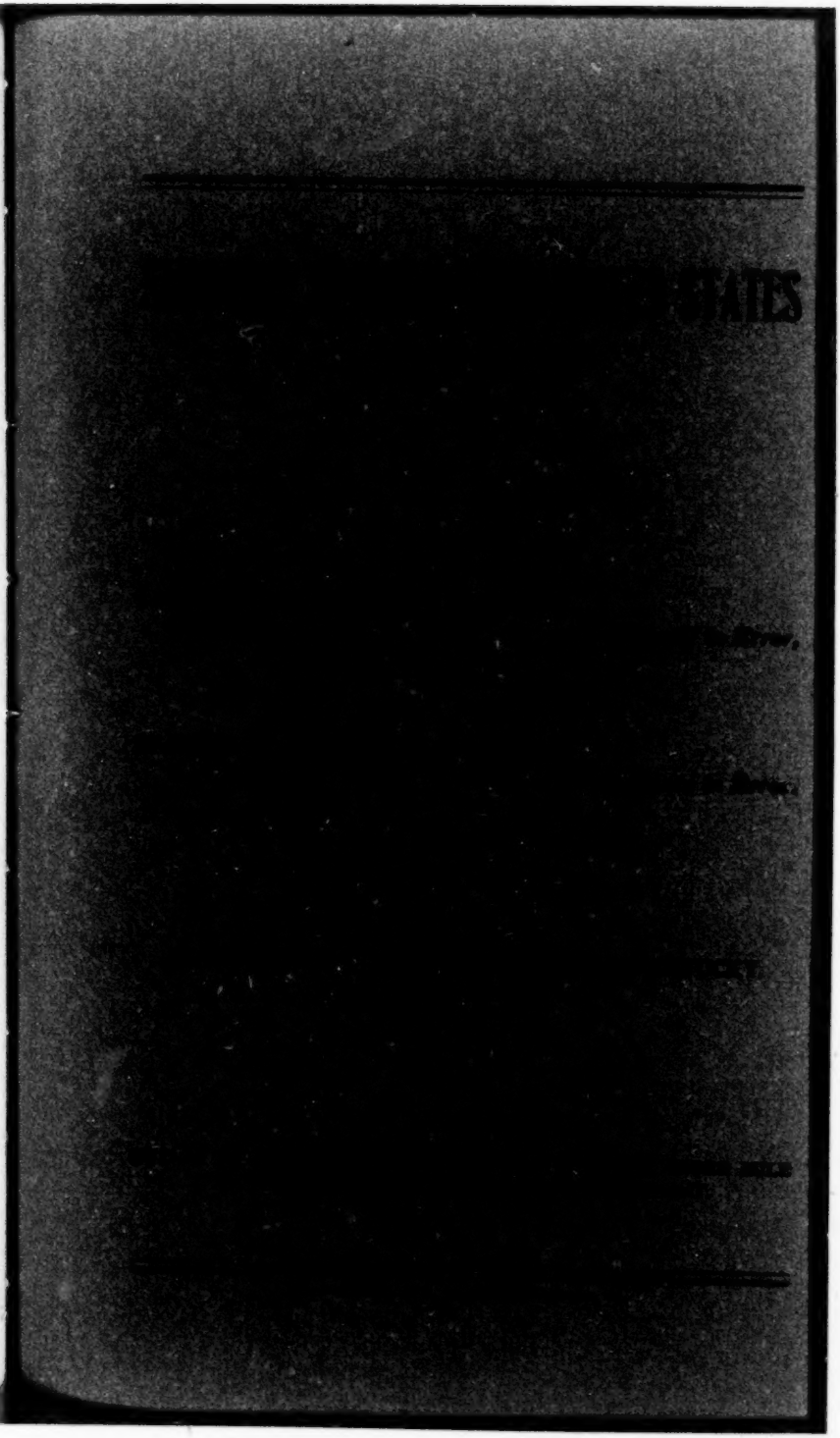
6. This is a case within the provisions of section 709, U. S. Compiled Statutes, page 575, wherein is drawn in question the validity of a statute of the United States by the defendants in error and where a right, privilege, or immunity is claimed under such statute by plaintiff in error, and the decision of the highest court in the State of Kentucky is against such right, privilege, or immunity specially

set up or claimed by the plaintiff in error. A case arises under the Constitution of the United States when the right of either party depends on the validity of an act of Congress, which is the fact in this case. (Patton *vs.* Brady, executrix, 184 U. S., 608.)

HENRY L. STONE,
Counsel for Plaintiff in Error.

OCTOBER 8, 1909.

[3452]



SUPREME COURT OF THE UNITED STATES

October Term, 1910.

No. 246.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - *Plaintiff in Error,*

vs.

ERASMUS L. MOTTLEY AND ANNIE E. MOTTLEY, HIS WIFE,

In Error to the Court of Appeals of the State of Kentucky.

This day came the parties, by their counsel, in the above styled case, and moved the court to submit the same under Rule 20, on the briefs filed, without oral argument.

January 9, 1911.

HENRY L. STONE,
Counsel for Plaintiff in Error.

LEWIS MCQUOWN,
CLARENCE U. MCELROY,
Counsel for Defendants in Error.

Office Supreme Court U. S.
FILED
JAN 9 1911
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

No. 246.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - *Plaintiff in Error,*

vs.

ERASMUS L. MOTTLEY AND ANNIE E. MOTTLEY, HIS WIFE, - *Defendants in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

In Error to the Court of Appeals of Kentucky.

HENRY L. STONE,
Counsel for Plaintiff in Error.

Westerfield-Bonte Co., Incorporated, Louisville, Ky.

SUPREME COURT OF THE UNITED STATES

October Term, 1910.

No. 246.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - *Plaintiff in Error,*

vs.

ERASMUS L. MOTTLEY AND ANNIE E. MOTTLEY, HIS WIFE, - - - *Defendants in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

STATEMENT OF CASE.

This suit in equity was brought by the defendants in error in the Circuit Court of Warren County, Kentucky, against the plaintiff in error November 24, 1908, to compel the specific performance of the following writing, executed and delivered at its date, to-wit:

> Louisville, Ky., October 2, 1871.
>
> The Louisville & Nashville Railroad Company, in consideration that E. L. Mottley and wife, Annie E. Mottley, have this day released said company from all damages or claim for damages for injuries received by them on the 7th of September, 1871, in consequence of a collision of trains on the railroad

of said company at Randolph's Station, Jefferson County, Ky., hereby agrees to issue free passes on said railroad and branches now existing or to exist, to said E. L. Mottley and Annie E. Mottley for the remainder of the present year, and thereafter to renew said passes annually during the lives of said Mottley and wife, or either of them.

Thos. J. Martin, Vice President,
Louisville & Nashville Railroad Company.

Willis Ranney,
Secretary.
(Seal)

This obligation was compiled with by plaintiff in error in all respects until January 1, 1907, when further compliance therewith was refused, so far as interstate transportation was concerned, because of the provisions of the Hepburn Bill, or Act amending the Act to Regulate Commerce, approved June 29, 1906, which (1) by Section 1 prohibits on or after January 1, 1907, any common carrier by railroad engaged in the interstate transportation of passengers or property, such as plaintiff in error, from issuing free interstate transportation for passengers, with certain exceptions in favor of specified classes, to none of which defendants in error belonged; and (2) by Section 6 declares that no such carrier shall "charge, or demand, or collect, or receive a *greater* or *less* or *different* compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs (meaning those published and filed with the Interstate Commerce Commission, in accordance with the provisions of said Act) than the rates, fares and charges which

are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Upon this refusal defendants in error filed their bill in equity against plaintiff in error in the Circuit Court of the United States for the Western District of Kentucky for the specific enforcement of said writing, to which plaintiff in error filed its demurrer.

In a written opinion this demurrer was overruled by that court (150 Fed. 406), and upon the plaintiff in error declining to plead further, a decree was entered in that case in favor of defendants in error herein, granting the relief prayed for. From that decree the plaintiff in error prosecuted an appeal to this court, which, on November 16, 1908, reversed said decree, with direction to the circuit court to dismiss said suit for want of jurisdiction. (211 U. S. 31.)

Upon the filing of the mandate in that case, the bill was dismissed as directed for want of jurisdiction in the Circuit Court of the United States for the Western District of Kentucky.

Pending said appeal, however, the plaintiff in error herein complied with the decree appealed from by issuing to each of the defendants in error herein passes covering their transportation over all the lines of the plaintiff in error both in and out of the State of Kentucky for the calendar years 1907 and 1908. But shortly

before January 1, 1909, the defendants in error having demanded like passes for each of themselves for the year 1909, in accordance with the provisions of said writing, dated October 2, 1871, good over the entire system of the plaintiff in error, both in Kentucky and in other States, the plaintiff in error again refused to issue the same as demanded for interstate transportation, but offered to issue to each of the defendants in error a pass over its lines in Kentucky, for that year, which offer the defendants in error declined to accept, and filed its petition in equity, as before stated, in the Circuit Court of Warren County, Kentucky. (R. 1-4.)

The plaintiff in error filed a general demurrer and answer to the petition. (R. 5-7.) To the answer defendants filed their demurrer (R. 7), which the Circuit Court of Warren County sustained, and the plaintiff in error having declined to plead further, entered on February 15, 1909, a decree that the plaintiff in error issue a pass to each of the defendants in error upon and over all its lines of railroad and its branches, wheresoever extended, for the remainder of that year, and thereafter renew said passes annually during the lives of the defendants in error or either of them. (R. 8.)

To this order sustaining the demurrer to its answer and the decree of that court granting to the defendants in error the relief prayed for, the plaintiff in error objected and excepted and prayed an appeal to the Court of Appeals of Kentucky, which was granted. (R. 8, 9.)

On motion this appeal was advanced for hearing, and submitted on briefs in the latter court April 16, 1909. (R. 9.)

On May 4, 1909, the court below, in an opinion by Judge Barker, affirmed the judgment appealed from. (R. 10-15.)

This opinion will be found reported in 133 Kentucky, 652.

The petition for writ of error, accompanied by an assignment of errors, was filed by the plaintiff in error, and allowed by order of the Chief Justice of the Court of Appeals of Kentucky, June 2, 1909, in pursuance of which, on the same date, a writ of error was issued, bond thereon executed, and citation issued and accepted, as required by law. (R. 15-21.)

By the answer filed in the Circuit Court of Warren County, it will be observed that the plaintiff in error denies the alleged right of the defendants in error to a specified enforcement of the contract sued on from and after December 31, 1906, or that they were after that date entitled to receive from the plaintiff in error free passes for interstate transportation of themselves or either of them on or over the lines of the plaintiff in error; and alleges that it was on February 4, 1887, the date of the passage of the original Act to regulate commerce, has been ever since, and is now a common carrier of passengers and property by railroad subject to the provisions of said Act, and the amendments thereto, in the States of Kentucky, Ohio, Indiana, Illinois, Missouri, Tennessee, Virginia, North Carolina, Georgia,

Florida, Alabama, Mississippi and Louisiana, and to and from points on its lines in each of said States to and from points on its lines in all others of said States, its system of railroads owned and operated by it therein being, during said period and now, over four thousand miles in length. (R. 5, 6.) The defenses relied on by plaintiff in error, and which raise the Federal questions involved herein, are set up in its answer, as follows (R. 6, 7):

> The defendant further states that by Section One (1) of said Act to regulate commerce, as amended June 29, 1906, it is provided:
>
> 'No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers.'
>
> Certain named classes are expected from the operation of said prohibition by the further provisions of said section, but none of said excepted classes embraces the plaintiffs or any person with whom a contract for free interstate passes or free interstate transportation had been made by any common carrier by railroad subject to said Act prior to the passage of said Amendatory Act of June 29, 1906; and defendants state that the prohibition aforesaid abrogated, nullified and made void and of no effect all such contracts, including the one made October 2, 1871, between plaintiffs and defendant, and sought to be enforced herein, which on January 1, 1907, was no longer enforcible, and on and after that date any compliance with the terms thereof by the defendant or use of such passes by plaintiffs was and would have been unlawful and in violation of the following provision in said section:
>
> Any common carrier violating this provision

shall be deemed guilty of a misdemeanor and for each offense on conviction, shall pay to the United States a penalty of not less than one hundred nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty.

Furthermore, by Section Six (6) of said Amendatory Act of June 29, 1906, which became effective August 28, 1906, it is provided:

No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or receive a *greater* or *less* or *different* compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

The defendant states that a violation of the provision last quoted and referred to is by the further provisions of the same section of said Act declared to be a misdemeanor, and the carrier, officer or agent guilty thereof is punishable therefor by a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense.

The defendant states that by reason of the provisions of the Act aforesaid it could not and can not

now lawfully comply with the demand made by the plaintiffs for free passes for interstate transportation over its lines of railroad, and, therefore, refused and still refuses to issue the same to plaintiffs for the current year; and were such passes issued to them, the defendant could not lawfully receive or accept the same for such transportation, or any *greater* or *less* or *different* compensation therefor than the rates, fares and charges, which are specified in its passenger tariffs filed with the Interstate Commerce Commission and in effect at the time, between points named therein, and which are charged and collected from all other interstate passengers on its lines of railroad.

Wherefore, the defendant prays that plaintiff's petition be dismissed, and for all other proper relief.

The errors assigned are as follows (R. 16, 17):

The plaintiff in error, the Louisville & Nashville Railroad Company, assigns as errors in the judgment of the Court of Appeals of Kentucky, rendered May 4, 1909, herein complained of, in the cause pending in that court of said company, appellant, against Erasmus L. Mottley and Annie E. Mottley, his wife, appellees, the following, to-wit:

I.

The Court of Appeals of Kentucky erred in affirming the judgment of the Warren Circuit Court in sustaining the appellees' demurrer to the appellant's answer.

II.

In holding that the contract between appellees and appellant, dated October 2, 1871, the specific performance of which was prayed for by appellees, is

valid or binding in law on appellant, with respect to interstate transportation of appellees over the railroads of appellant, since the Act of Congress to amend 'The Act to Regulate Commerce,' approved June 29, 1906, went into force and effect.

III.

In ruling that, under said contract, appellees were and are lawfully entitled to receive from appellant, during their lives, interstate transportation free or without charge, or without the payment of money at regular rates therefor, and to use the same over all or any of the lines of railroad owned or operated by appellant, as a common carrier of passengers, from one State to another or other States of the United States, and that appellant, by said contract was and is lawfully bound to grant for the year 1909, and annually thereafter, at the beginning of each year, such transportation to appellees as long as they or either of them live, notwithstanding the provisions of Section One (1) of said Act, as amended, forbidding the issuance of such transportation free or without charge to any person on or after January 1, 1907, except those belonging to certain classes, to none of which appellees belong.

IV.

In decreeing the specific enforcement of said contract of October 2, 1871, with respect to interstate transportation and that appellant from year to year must furnish the same to appellees as long as they live, although the provisions of Section Six (6) of said Act as amended, which took effect August 28, 1906, expressly prohibits, under heavy penalties, the appellant as such common carrier from charging, demanding, collecting, or receiving a greater or less or different compensation for such transportation of

passengers or for any service in connection therewith, between the points named in appellant's tariffs published and filed with the Interstate Commerce Commission, in accordance with the provisions of said Act.

V.

In ruling that the contract sued on had not been abrogated or nullified so far as the same concerned the interstate transportation of appellees over appellant's lines of railroad on and after January 1, 1907, by the provisions of the Act of Congress, approved June 29, 1906, amending the Act to Regulate Commerce, such contracts not having been thereby excepted from the operation of those provisions.

VI.

In ruling that appellees were entitled to any relief whatever against appellant by virtue of the contract sued on on account of appellant's refusal to issue to them interstate transportation for the year 1909, or any subsequent year during their lives.

VII.

In not holding that the Warren Circuit Court erred in not carrying appellees' demurrer to appellant's answer back to appellees' petition, and in not sustaining the same thereto, and in not reversing the judgment of said circuit court appealed from, with direction to dismiss appellees' petition.

BRIEF OF ARGUMENT.

I.

FREE INTERSTATE TRANSPORTATION FORBIDDEN.

Whatever may be said of the character of the transportation provided for in the writing sued on, it is denominated therein by the parties themselves as "free passes," and was accepted by defendants in error as properly so denominated. Furthermore, so far as such passes covered interstate transportation, defendants in error accepted said instrument with full knowledge that it was within the power of Congress thereafter to so regulate such transportation as to prevent its issuance or use at any time under the commerce clause of the Constitution of the United States. If defendants in error have been deprived by Congress, in the exercise of its said power, of the use of such transportation over the lines of plaintiff in error, they have not been deprived of their property, without due process of law, within the meaning of the Fifth Amendment, as claimed by them, nor does the passage of the Act to Regulate Commerce or the amendment thereto of June 29, 1906, impair the obligation of this contract, which is of an executory character, to be performed in the future from year to year, between plaintiff in error and defendants in error; but, even if such were the case, it is entirely within the power of Congress to do so, as the impairment complained of is merely

an incident to or consequence resulting from such legislation.

The object of the Act of June 29, 1906, was to prevent discrimination, and to place all passengers and shippers on the same level, with equal rights and privileges, when traveling or shipping property over the lines of interstate common carriers by railroad, and to require all alike to pay passenger and freight rates and fares between the same points as fixed in the schedules filed by the carriers, subject to said Act, with the Interstate Commerce Commission, without preference, discrimination or exception or regard to prior contracts or other arrangements.

While Congress may not pass an Act for the purpose of impairing the obligation of specific contracts, it may, in the due exercise of the powers expressly conferred upon it, incidentally do so.

In *Knox* v. *Lee* and *Parker* v. *Davis* (*Legal Tender Cases*), 12 Wallace, 550-51, the court said.

> If, then, the Legal Tender Acts were justly chargeable with impairing contract obligations, they would not, for that reason, be forbidden, unless a different rule is to be applied to them from that which has hitherto prevailed in the construction of other powers granted by the fundamental law, but, as already intimated, the objection misapprehends the nature and extent of the contract obligation spoken of in the Constitution. As in a state of civil society, property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the Gov-

ernment, and no obligation of a contract can extend to the defeat of legitimate government authority.

Closely allied to the objection we have just been considering, is the argument pressed upon us that the Legal Tender Acts were prohibited by the spirit of the Fifth Amendment, which forbids taking private property for public use without just compensation or due process of law. That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war, may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that because of this a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared?

In *Bullard* v. *Northern Pac. R. Co.*, 10 Mont. 168, 45 Am. & Eng. R. Cases, 234, 11 L. R. A. 246, the Supreme Court of Montana held that a shipper could not recover rebates stipulated for in a contract in violation of the second section of the Interstate Commerce Act, although the contract was entered into *prior* to the passage of that Act. The court, after quoting liberally from the decisions of the Supreme Court of the United States relative to the power of the States to regulate the charges of public service corporations, said (p. 251):

The liberal quotations from these opinions show clearly the grounds upon which legislation similar to the provisions of the Act of Congress under examination are based, and also the limitations which have been sometimes placed upon the law-making

power in this regard. Counsel in their briefs have not pointed out, and we have been unable to find, any case in which a contract like that in the complaint has been protected from the operation of a statute which fixed penalties for an unfair discrimination by railroad companies in their tariffs for carrying freight. We think that the significance of this fact can be easily understood, when we inquire into the authority of this species of legislation by the States.

Again, in the same case, the court said (p. 252):

> There is an old rule of law which can be invoked and applied to the case at bar. In *Atkinson* v. *Ritchie,* 10 East 530, Lord Ellenborough, Ch. J., said in the opinion: 'That no contract can properly be carried into effect which was originally made contrary to the provisions of law, or which, being made, consistently with the rules of law, at the time, has become illegal in virtue of some subsequent law, are propositions which admit of no doubt.' Professor Pomeroy writes: 'An illegal contract is, as a rule, void, not merely voidable, and can be the basis of no judicial proceeding. No action can be maintained upon it, either at law or in equity. This impossibility of enforcement exists whether the agreement is illegal in its inception, or whether, being valid when made, the illegality has been created by a subsequent statute.' Cont., Sec. 280.

In 8 Cyc., at page 997, it is said:

> It is observable that individuals must necessarily contract with full knowledge that the Legislature may draw at any time from the vast reservoir of power, defined and undefined, intrusted to it. Legislation which can properly be referred to this great fund of authority, however nearly it may affect the contract in question, is not invalid.

In *Neport News & M. V. Co.* v. *McDonald Brick Co.'s Assignee,* 109 Ky. 408, the Court of Appeals of Kentucky held that the performance of a contract to give certain rates was not rendered impossible by the passage of the long and short haul law, as the railroad might change its other rates so as to make the contract rate legal, but recognized the principle for which we are contending in the opinion in that case by Judge Burnam, as follows (pp. 418-19):

> The effect of changes in the statutes upon the rights of parties, under existing contracts, is clearly stated in 10 Am. & Eng. Ency. of Law (1st Edition), page 182. It is as follows: 'If subsequently to the making of contracts a statute is enacted which makes the performance of the contract unlawful, a legal impossibility supervenes which releases the promisor from his obligation; but if the performance of the obligation is rendered merely more burdensome or expensive, the enactment of the statute creates no such impossibility as will excuse the obligor.'

The court's attention is called to the case of *Fitzgerald* v. *Fitzgerald & Mallory Construction Co.,* 59 N. W. 862-63, decided by the Supreme Court of Nebraska, June 26, 1894, where it was held that the Act of Congress, entitled "An Act to Regulate Commerce," when it took effect, abrogated all existing contracts with common carriers for special interstate commercial rates, and specially vested in the Federal tribunals described in that Act exclusive jurisdiction to inquire into and adjust such interstate rates as are alleged to be unfair or discriminative. The court will find that in that opinion

(at page 862) the court discusses the contention that, as said statute was *not retroactive in its terms*, it was to be construed as *prospective* only, and as not having the effect of abrogating existing contracts in conflict therewith. In that connection the court cites with approval the case of *Southern Wire Co.* v. *St. Louis Bridge & Tunnel Railway Co.*, 38 Mo. App. 191, where the court said:

> We are clear of all doubt that it was the purpose of Congress, in enacting this statute, to put to an end all existing contracts and arrangements producing unjust discrimination among shippers upon interstate railways. * * * It would greatly impair its effect to hold that it does not operate to abrogate existing contracts which are opposed to its prohibitions. Such a holding would open the door to fraudulent evasions of it by the making of contracts creating unjust discriminations, and antedating them so as to place them seemingly beyond its reach.

Among others, the case of *Fitzgerald* v. *Grand Trunk Railroad Co.* (Vt.), 22 Atl. 76, 77, is cited by the Supreme Court of Nebraska, in the case above referred to, wherein the court said, with reference to a contract which called for the transportation of lumber through three States:

> Such commerce is solely regulated by Congress, and when parties make contracts to engage in interstate commerce, they are held to do so on the basis and with the understanding that changes in the law applicable to their contracts may be made. There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal, nor vested right in the omission to legislate

> upon a particular subject which exempts a contract from the effects of subsequent legislation upon its subject matter by competent legislative authority. (Citing numerous cases.)

In that case the court concluded as follows:

> The case, then, comes to this: The plaintiff seeks to enforce a contract which is prohibited by law. The doctrine is elementary that whenever the plaintiff is compelled, in order to make out his case, to show the illegal contract, he can not recover.

It must be borne in mind that these decisions under the provisions of the Act to Regulate Commerce were rendered prior to the passage of the Hepburn Bill of June 29, 1906, and, of course, apply with still greater force since that Act took effect.

All the cases concur in holding that the power of Congress to regulate commerce is paramount and is unrestrained, except by the limitations upon its authority by the Constitution. This power is "complete in itself and acknowledges no limitations other than those prescribed by the Constitution."

Gibbons v. *Ogden,* 9 Wheat. 1.
Addyston Pipe & Steel Co. v. *United States,* 175 U. S. 228.
Scranton v. *Wheeler,* 179 U. S. 162.

The only limitation which appears to be prescribed by the Constitution is that the laws enacted by Congress to carry into execution this power shall be "necessary and proper." (Sub-div. 18, Sec. 8, Art. 1.) Whether legislation for this purpose is necessary and proper is

a question wholly and exclusively within the province of Congress to determine.

The power of Congress to enact the regulations involved in this case is conceded by the learned counsel for the defendants in error, and it is also conceded that no contract of the character of that sued on herein could, since the enactment of these regulations, be lawfully made, yet it is contended that to give to such regulations the effect of abrogating or nullifying the provisions of this and similar contracts from the effective date of the Amendatory Act of June 29, 1906, would be inequitable, because of the impairment of the obligations of such contracts by divesting vested rights acquired under the same prior to that date. Interstate transportation of passengers is commerce within the meaning of the commerce clause of the Constitution. The subject-matter of the contract between the plaintiff in error and the defendants in error was and is interstate commerce.

In *Kentucky & Indiana Bridge Co.* v. *Louisville & Nashville Railroad Co.*, 34 Am. & Eng. R. Cas. 630, Judge Cooley, the learned first Chairman of the Interstate Commerce Commission, delivered the opinion, and at page 653 said:

> But the Act to Regulate Commerce is a general law, and contracts are always liable to be more or less affected by general laws, even when in no way referred to. This is the case with State laws, as well as with Federal. There probably was never an Act passed in restraint of the sale of intoxicating drinks that did not affect some contracts, and render

> their literal enforcement impossible. The same may be said of the Federal revenue laws. Nothing is more likely than that a considerable change in customs regulations or customs duties, or in the provisions made for enforcement of excise laws will deprive some party of a right he supposed he had secured by contract. But this incidental effect of the general law is not understood to make it a law impairing the obligation of contracts. It is a necessary effect of any considerable change in the public laws. If the Legislature had no power to alter its police laws when contracts would be affected, then the most important and valuable reforms might be precluded by the simple device of entering into contracts for the purpose. No doctrine to that effect would be even plausible, much less sound and tenable.

It is true the order entered by the Commission in that case was not sustained by the Circuit Court of the United States for the District of Kentucky, but upon grounds, however, that did not conflict with the foregoing views of Judge Cooley. (*Kentucky & Indiana Bridge Co.* v. *Louisville & Nashville Railroad Co.*, 37 Fed. 567.)

Concerning "what is a vested right in the constitutional sense?" Judge Cooley says (Con. Lim., 7th Ed., pp. 509-10):

> In organized society every man holds all he possesses, and looks forward to all he hopes for, through the aid and under the protection of the laws, but as changes of circumstances and of public opinion as well as other reasons affecting the public policy are all the while calling for changes in the laws, and as these changes must influence more or

> less the value and stability of private possessions, and strengthen or destroy well-founded hopes, and as the power to make very many of them could not be disputed without denying the right of the political community to prosper and advance, it is obvious that many *rights, privileges, and exemptions, which usually pertain to ownership under a particular state of the law, and many reasonable expectations, can not be regarded as vested rights in any legal sense.*

In *Bradford* v. *Jenkins, et al.*, 41 Miss. 328, 335-37, it is held that—

> A contract to do a thing lawful when made is avoided by subsequent legislation making it unlawful. 'Every owner of property holds the same subject to such action as the sovereign power of the State may in the exercise of its legitimate sovereignty adopt in relation to it.

No contract between a private party and a common carrier concerning transportation among the States will be so construed as to vest rights, which will have the effect of tying the hands of Congress and to deprive it of the power, under the commerce clause of the Constitution, to enact laws regulating commerce. "Due process of law" as used in the Fifth Amendment to the Constitution, includes not only the established mode of procedure in the courts, but also legislative acts within constitutional powers. (Cooley Con. Lim., 7th Ed., 502; Words and Phrases Judicially Defined, Vol. 111, p. 2228, and cases cited.)

The prohibition against the issuance or giving directly or indirectly of "any interstate free ticket, free

pass or free transportation for passengers'' is definite and positive, admitting of no exception in addition to those specifically set out in Section 1, or Section 22 of the Act. Had it been the intention of Congress to exclude from the operation of this prohibition against free passes those holding previously executed contracts with an interstate carrier subject to the Act, such as that held by the defendants in error, an exception to that effect would undoubtedly have been added to those exceptions actually specified in the Act. The exceptions expressed exclude all others not expressed.

So the Act provides:

> 'Any common carrier violating this provision,' that is to say, giving or issuing (under a contract to do so or otherwise) a pass for interstate transportation to a person not embraced in one of the excepted classes, 'shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty,' etc.

Furthermore, Section 1 of the Act provides:

> *Any* person, other than the persons *excepted* in this provision, who *uses* any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty.

In the case decided by the Circuit Court of the United States for the Western District of Kentucky (150 Fed. 406), that court, in order to reach its conclusion, said:

> We should construe the Act as containing an *exception* to the general language used, and that the issuing of the free passes provided for in the contract was not meant to be prohibited by the statute.

Now, this court has distinctly announced the rule that "where *no exception* is made *in terms*, none will be made by mere *implication* or *construction.*" (*Rhode Island* v. *Massachusetts*, 12 Pet. 892.)

In *Dartmouth College* v. *Woodward*, 4 Wheat. 494, the rule as to exceptions by construction is laid down, as follows:

> The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception.

The court can not make an exception not plainly suggested by or to be implied from the language actually used in the statute. For the court to go beyond that limitation is not to construe, but to legislate.

In *Armour Packing Co.* v. *United States*, 209 U. S. 56, in passing upon the validity of a contract between a carrier and a shipper for rates, which at the date of the contract were lawful, but which at the date of the shipment were less than those in the carrier's tariff on file with the Interstate Commerce Commission, this court said (p. 81):

> There is *no provision excepting special contracts* from the operation of the law. One rate is to be charged and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. There is no provision for the filing of contracts with shippers and no method of making them public defined

in the statute. If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

In Section 4, Endlich on Interpretation of Statutes, the author states:

> It is, therefore, only in the construction of statutes whose terms give rise to some ambiguity or whose grammatical construction is doubtful, that courts can exercise the power of controlling the language in order to give effect to what they suppose to have been the real intention of the law-makers. Where the words of a statute are plainly expressive of an intent not rendered dubious by the context, the interpretation must conform to and carry out that intent. It matters not in such a case what the consequences may be. It has, therefore, been distinctly stated from early times down to the present day that judges are not to mold the language of statutes in order to meet an alleged convenience or an alleged equity; are not to be influenced by any notions of hardship or of what in their view is right and reasonable, or is prejudicial to society; are not to alter clear words, though the Legislature must have contemplated the consequences of using them; are not to tamper with words for the purpose of giving them a construction which is supposed to be more consonant with justice than their ordinary meaning. Where, by the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the Legislature, it must be enforced, even though it be absurd or mischievous. If the words go beyond what was probably the intention, effect must nevertheless be given to them. They can not be construed contrary to their meaning as embracing or *excluding* cases merely because no

> good reason appears why they should be excluded or embraced. However unjust, arbitrary or inconvenient the intention conveyed may be, it must receive its full effect.

Again, in Section 8 of the same work, the author states:

> The intention of the Legislature is to be ascertained by means of the words which it has used, and though these words are often modified, though their literal sense is not always adopted, though they are sometimes strained, transported, treated as inadequate or as superfluous, they are still the only interpreters of the mind of the Legislature. The court knows nothing of the intention of an act except from the words in which it is expressed applied to the facts existing at the time. * * * Every departure from the clear language of a statute is in effect an assumption of legislative powers by the court.

In *Mottley* v. *Louisville & Nashville Railroad Co.*, 150 Fed. 406, Judge Evans, in passing upon the application of the Hepburn Bill to the contract sued on, said (p. 409):

> Of course, contracts like the one sought to be enforced are extremely rare—so rare that presumably they did not, in fact, come within the contemplation of Congress when it was perfecting Sections 1 and 2 of the Act of 1906.

But in Section 6 of Endlich on Interpretation of Statutes, it is stated:

> It has been said that though vested rights are divested, those who have to interpret the law must

> give effect to it. And they are bound to do this even when they suspect (on conjectural grounds anly) that the language does not faithfully express what was the real intention of the Legislature when it passed the Act, or would have been its intention if the specific case had been proposed to it. * * * 'It may have been an oversight in the framers of the Act,' says Parke, B., in one case (Nixon v. Phillips, 21 L. J. Ex. 90, 7 Ex. 192), but we must construe it according to its plain and obvious meaning.

The rule of construction laid down by Mr. Justice Story in *United States* v. *Dickson,* 15 Pet. 141-163, was this:

> In short, a proviso carries special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the *words,* as well as within the reasons, thereof.

In *United States* v. *Wells-Fargo Express Co.,* 161 Fed. 606, wherein the issuance of franks by an express company engaged in the interstate transportation of property violated the Act to Regulate Commerce as amended by the Hepburn Bill of June 29, 1906, Circuit Judge Kohlsaat said (p. 610):

> It is, however, evident that the passage of the Acts of 1903 and 1906 contemplated a more effectual enforcement of the statute. The requirements are made more specific and the prohibitions more emphatic, and, as if to make an end of the violations theretofore winked at, it was declared in 1906 that free transportation of persons *except in certain specifically named instances* should not be granted after January 1, 1907.

He concluded the opinion in that case as follows (p. 618):

> Free carriage of persons and property, *other than that permitted by the Act,* and that required solely for the purposes of the carrier and necessary in the performance of its duty to the public, is prohibited by the statute. The Acts described in the pleadings come within neither of these classes, and are therefore declared to be in violation of the law.

In the opinion by Mr. Justice Day, affirming the decision last cited, it was said (*Express Company Cases,* 212 U. S. 532):

> But the power of Congress over interstate transportation embraces all manner of carriage of that character—whether gratuitous or otherwise—and, *in the absence of express exceptions,* we think it was the intention of Congress to prevent a *departure* from the published rates and schedules *in any manner whatsoever.*

Again, in those cases this court said (p. 533):

> If it is lawful, in view of the provisions of the Interstate Commerce Act, to issue franks of the character under consideration in this case, *then this right must be founded upon some exception incorporated in the Act.*

So, it is insisted in the present case, if the issuance by the plaintiff in error of passes for the interstate transportation of the defendants in error be lawful, "some exception incorporated in the Act" must be pointed out as the foundation of such right. This has not and can not be done.

While the decision of the questions involved herein is not to be governed by considerations of supposed hardship, it may be well to observe that from this record it is apparent that defendants in error have enjoyed both interstate and intrastate transportation over the entire system of plaintiff in error, with its mileage largely increased from time to time, without limit or interference from any source, for a period of more than thirty-nine (39) years; and, although their free interstate transportation must now cease by reason of the prohibitive provisions of the Act to regulate commerce as amended by the Hepburn Bill, they still have, in their declining years, free intrastate transportation over the sixteen hundred miles of railroad owned and operated by plaintiff in error within the State of Kentucky, and should they relief they ask herein be denied them, they will be subjected necessarily to but slight loss or inconvenience.

II.

INTERSTATE PASSENGER TRANSPORTATION MUST BE PAID FOR IN MONEY.

The main object of the Amendment of June 29, 1906, to the Act to regulate commerce was to place every passenger and every shipper over the lines of an interstate carrier on an exact equality, and require each one to pay in money the established published rates fixed in the tariffs of the carrier, and filed with the Interstate Commerce Commission. To this end the words "or different" were inserted in Section 6 of said Act, so that

case, as a complete defense to this action, reads as follows:

> Nor shall any carrier charge or demand or collect or receive a *greater* or *less* or *different* compensation (that is, other than money) for such transportation or passengers or property or for any service in connection therewith, between the points named in such tariffs, than the rates, fares and charges which are specified in the tariff filed and in effect at the time.

Plaintiff in error can not comply with this provision of said section and at the same time comply with the terms of the contract which the court is asked in this case to specifically enforce. In so far as said contract remains unexecuted or unfulfilled, on the part of plaintiff in error, the defendants in error are remediless. They would not, it is believed, have even a right of action for damages, for the plaintiff in error has voluntarily committed no breach, but Congress, in the exercise of its express and plenary power to regulate commerce, has stepped in and declared that such a contract as is sought to be specifically enforced herein is illegal and void, and this result is brought about by no act of the plaintiff in error, but by the lawful exercise of the power thus vested in Congress. In other words, the contract between defendants in error and plaintiff in error can no more be enforced than if it had been made subsequent to the enactment of said amendment.

If such a contract could not now be lawfully made with defendants in error by plaintiff in error, the contract made before the passage of said amendment can

not be enforced, although valid at the time it was made and supported by a sufficient consideration. It ceased to be lawful on January 1, 1907.

Prior to the judgment of the Circuit Court of the United States for the Western District of Kentucky in 150 Fed. 406, a letter dated January 16, 1907, was written by Mr. J. F. Tucker, Chairman of the Central Territory Transportation Association, Chicago, to Mr. E. A. Moseley, Secretary of the Interstate Commerce Commission, making the following inquiry, to-wit:

> Question has arisen as to the legality of issuing annual or other free or reduced rate transportation in favor of parties injured in wrecks prior to the passage of the Hepburn Law, contracts in settlement specifying the annual or other forms of free or reduced rate transportation shall be granted; also contracts or agreements as to free or reduced rate transportation, made with parties for right of way before the passage of the Hepburn Law, whereby free or reduced rate transportation was to be furnished; also as to furnishing transportation for inspectors of employes' watches and solicitors for insurance.
>
> Will you kindly advise me of the Commission's ruling in these matters, and thus oblige?

In response to this communication, Hon. James S. Harlan, one of the Commissioners, sent the following communication as expressive of the views of the Commission, dated at Washington, on January 19, 1907, to-wit:

> The matter of free transportation has been considered by the Commission with great frequency and in many different forms. Replying, therefore, as

briefly and concretely as possible to your letter of the 16th, I beg to say that the Commission, under the Act to regulate commerce as amended June 29, 1906, has expressed the opinion that transportation can not be used in payment for labor done, or services performed, or for supplies and materials purchased. We have also said that it can not be issued in compensation for the conveyance of real estate for a right of way or for station purposes. We have also held that it can not be issued in liquidation of damages claimed by one who has been injured through the negligence of a carrier. And these rulings apply whether the real estate was purchased or the claim for damages settled prior to August 28, 1906, when the Act went into effect, or afterwards. On that date any such transportation then outstanding became void and the undertaking of any carrier on the basis of any such contract thereafter to furnish free transportation was nullified by the Act. In other words, the Commission holds, as I understand our attitude on these questions, that transportation can not be used as a medium for the discharge of debts and obligations of that character, whether the contract so to discharge such obligation in free transportation was dated before or after the date when the law went into effect. In answer to several inquiries we have advised the writers to consult with their counsel as to whether suit may be brought on such a contract in order to commute the value of the free transportation agreed upon into a money judgment against the carriers. (Decisions of Interstate Commerce Commission relative to Railroad Passes and Free Transportation, Senate Document No. 226, 60th Congress, First Session, Communicated to the Senate February 6, 1908, page 18.)

In the Conference Rulings of the Interstate Commerce Commission, issued by order of the Commission December 28, 1909, page 57, it will be found the follow-

ing rule was promulgated as early as September 15, 1906, to-wit:

> 207. PAYMENT FOR TRANSPORTATION. Nothing but *money* can be lawfully received or accepted in payment for transportation subject to the Act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates or fares in effect at the time precludes the acceptance of services, property, or other payment in lieu of the amount of money specified in the published schedules.

These rulings on the part of the Commission appear to be well founded and necessary to carry into full force and effect both the letter and spirit of the Act to regulate commerce, as amended June 29, 1906. The judgment of the court below is at variance therewith. In order to have settled and determined which interpretation of said Act is the true and correct one to be followed by plaintiff in error, and other carriers subject thereto, this writ of error is being prosecuted. If a prior contract with respect to *passenger* transportation, such as the one under consideration, is still valid and enforcible, a like contract for the transportation of *property* of any kind free or at reduced rates, made before August 28, 1906, would have to be also upheld by the courts as valid and enforcible.

In the opinion of this court in *Armour Packing Co.* v. *United States, supra,* it was held that a shipper is guilty of accepting transportation of property at less

than the carrier's published rates, in violation of the Elkins Act of February 19, 1903, where, after the carrier has duly established a higher rate, he secures such transportation at the rate agreed upon in a prior contract with the carrier (executed August 6, 1905), which was the legal, published and filed rate when the contract was made, since the statute, being then in force, is read into such contract, and becomes a part of it.

The same rule was laid down in *Chicago, Burlington & Quincy Railway Co.* v. *United States,* decided at the same time (*Ib.* 90.)

It is well settled that there can be no lawful departure by a carrier subject to the Act to regulate commerce from its published rates for interstate transportation on file with the Commission, upon any consideration or in any sense or to any extent, without subjecting such carrier to the penalties of said Act.

Union Pacific R'y Co. v. *Goodridge,* 149 U. S. 690, 691.
Gulf, Colo., etc., R'y Co. v. *Hefley,* 158 U. S. 98.
I. C. C. v. *Ches. & Ohio R'y Co.,* 200 U. S. 361.
Tex. & Pac. R'y Co. v. *Mugg,* 202 U. S. 242.
Tex. & Pac. R'y Co. v. *Abilene Cotton Oil Co.,* 204 U. S. 439.
Poor Grain Co. v. *C. B. & Q. R'y Co.,* 12 I. C. C. R. 418, 469.

The non-enforcibility of the contract which is sought to be enforced in this case, results from the exercise by Congress of lawful power, and the public policy embodied in the general Act to regulate commerce as amended June 29, 1906, which requires all passengers (except cer-

tain specified classes) on interstate railroads to pay in *money* for interstate transportation the regular rates and fares published and filed by the carrier with the Interstate Commerce Commission. It was the policy of Congress in enacting this general law to abrogate all prior contracts between interstate carriers by railroad and interstate passengers and shippers of freight, whereby the carrier had agreed to accept or receive for such transportation "a greater or less or *different* compensation" for the service rendered "between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time." Defendants in error had no vested right, under this contract with plaintiff in error, that was beyond the power of Congress to take away in the enactment of a general law regulating commerce among the States. Their contract with plaintiff in error is no more enforcible since the enactment of such general law, than it would be if there had been on October 2, 1871, incorporated therein an express provision that it was made and entered into subject to the exercise of the power of Congress, in regulating commerce among the States, to nullify so much thereof as contemplated the issuance by plaintiff in error to defendants in error of free passes for interstate passenger transportation.

In *United States* v. *Chicago, I. & L. Railway Co.*, 163 Fed. 114, it was decided by the Circuit Court of the United States for the Northern District of Illinois on July 15, 1908, Circuit Judge Kohlsaat delivering the opinion, that a contract by a railroad company to furnish

the publisher of a magazine, as called for, transportation amounting to a certain sum at schedule rates in payment for a stated amount of advertising, which has no fixed value, is in violation of the provision of Section 6 of the Interstate Commerce Act of March 2, 1889, as amended by the Hepburn Act of June 29, 1906, prohibiting any interstate carrier by railroad from accepting "greater or less or different" compensation than that named in its published schedules. This decision is now pending on the appeal of the railway company in this court, and is No. 74 on the docket for the October Term, 1910. Thus, the proposition that nothing but *money* or *cash* can be accepted by such a carrier for the transportation of a passenger has been so far upheld in a case directly involving that question.

The contract considered in that case, however, was entered into by the carrier and the publishing company after the effective date of the Hepburn Bill, enacted June 29, 1906.

In the opinion of Circuit Judge Kohlsaat he refers to the ruling by the Commission, cited above, adopted September 15, 1906, interpreting the Act, to the effect that "nothing but *money* can be lawfully received or accepted in payment of transportation subject to the Act, whether passengers or property, or for any service in connection therewith" (p. 116). In the course of his opinion he states (p. 118):

> It is conceivable that a case may arise in which, from the nature of the facts involved, it might be difficult, if not impossible, to say whether the rate

is greater or less than the published rate, which would, nevertheless, be covered by the term 'different,' within the meaning of the whole Act. It is essential to the spirit of the statute that the value of transportation be fixed and certain. In no other way can it be held to be exactly the same to all. If one person may purchase it with advertising, another with labor, and another with produce, the value of which is a matter of agreement between the parties, how can it be said the schedule rate is always maintained? Would not the rate rest in the whim of the carrier? Such is not the intent of the law. To say to one man, 'You must pay cash,' and to his competitor, 'You may pay in service or merchandise at prices we may agree on,' be it more or less than the market prices, would seem clearly to constitute such a difference in transportation as is condemned by the Act.

In the case of *United States* v. *Atchison, T. & S. F. R'y Co.*, 163 Fed. 111, the court in speaking of the Act to regulate commerce, and the amendments thereto, said (p. 113):

These statutes, as said by the Supreme Court, should be reasonably construed, so as to promote their objects, and it is manifest that a construction which allows any deviation whatever from said standard would seriously impair the efficiency of said statutes, if not render then nugatory, and is therefore wholly inadmissible. A rate, to be uniform in its operation, must necessarily be expressed in dollars or cents, and when so expressed, as is the case with the rate here involved, the mode of payment is an essential part of the rate. To so interpret the law as to allow the carrier to disregard said mode, and to accept a part only of its compensation in money and the balance in a commodity, or by way of com-

> promising a claim, would invite and open a wide door to the very discriminations which the statutes were designed to suppress.

The judgment in that case was reversed in *Atchison, T. & S. F. R'y Co.* v. *United States,* 170 Fed. 250, on the ground that in a criminal case the departure from the legal rate must be shown to have been made willfully, and the intent with which it is done is of the essence of the offense, the court below having ruled otherwise. The Circuit Court of Appeals, however, in the opinion, took occasion to say (p. 251):

> We are in entire accord with the learned judge of the court below in his holding that this Act, as well as all other Acts upon the same subject, should be so construed and enforced by the courts as to promote their policies and extirpate the evils against which they are directed.

That case was decided on transactions occurring prior to the effective date of the Hepburn Bill.

In *State* v. *Martyn,* 117 N. W. 719, 23 L. R. A. (N. S.) 217, the Supreme Court of Nebraska, under the Anti-Pass Law of that State, approved March 30, 1907, the prohibitive provisions of which are similar to those on the same subject in the Act to regulate commerce, held to be illegal a contract entered into before the passage of said Anti-Pass Law, by and between the Union Pacific Railroad Company and Dr. David T. Martyn, Sr., one of its surgeons, by the terms of which the latter should furnish all necessary surgical and medical treatment to the sick and injured employes of said railroad company

free of charge to said employes, and also render such services to passengers and others for whom the company should request the same between certain points, for which he was to receive an annual pass on the Nebraska Division of said railroad, together with trip passes on other divisions thereof, and $25 per month during his employment, which it was provided could be canceled and terminated at any time for cause by said railroad company.

Dr. Martyn, on an information filed against him in the District Court of Platte County, for unlawfully accepting and using a free pass from said railroad company, was found not guilty by the jury under the direction of that court to so find; but, on the appeal of the State, the judgment discharging him from further prosecution was reversed by the Supreme Court of that State, on the ground that when the statute took effect, the contract, so far as the free pass feature thereof was concerned, became illegal and its obligations gave way and were suspended.

In *McNeill* v. *Durham & C. R. Co.*, 132 N. C. 510, it was held that a contract between a railroad company and the publisher of a newspaper, by which he was to publish the time-tables of the company and receive a pass over its line of railroad, as compensation therefor, was invalid and an illegal discrimination, under the statutes of North Carolina. In the course of the opinion in that case the court said:

> Subject to the liberal exceptions just recited, the General Assembly deemed that free transportation

> or any other discrimination was so much against public policy that a violation of the statute was made punishable with a fine 'not less than one thousand dollars and not exceeding fixe thousand dollars for each offense.' Nothing could be more clearly a discrimination than the ground upon which the plaintiff asked for and received free passage on this occasion, to-wit: That for the year previous he had advertised the schedule of the defendant company in his paper, and had received therefor a free pass over its line for the previous year, and that this contract had been renewed for the year then current. It does not appear what was the value of the advertising done, charging for the space at the same rate as would be charged another, but, let it be what it may, it could not amount exactly, 'neither more nor less' to the value of a free pass to travel *ad libitum* an unstipulated number of miles over the defendant's road. Besides, it was an illegal discrimination to sell the plaintiff transportation on credit and not payable in money.

It is submitted that neither the reasoning nor the authorities cited in the opinion of the court below, and neither the argument in the brief of the learned counsel for defendants in error, nor the authorities cited therein, are applicable to this case or sufficient to sustain the judgment herein, compelling the plaintiff in error to continue to specifically perform the terms of the contract sued on, notwithstanding the prohibitive provisions of Sections 1 and 6 of the Act to regulate commerce as amended June 29, 1906.

Upon the errors assigned, and the grounds urged, supported by the authorities referred to herein, this court is respectfully asked to reverse the judgment of

the court below with direction to reverse the judgment rendered by the Circuit Court of Warren County, Kentucky, with instruction to the latter court to dismiss the petition of the defendants in error.

HENRY L. STONE,
Counsel for Plaintiff in Error.

Authorities Cited.

STATEMENT OF CASE.

Sections 1 and 6, Amendatory Act to Regulate Commerce, approved June 29, 1906.
Mottley, *et ux.*, v. Louisville & Nashville R. Co., 150 Fed. 406-13.
Louisville & Nashville Railroad Co. v. Mottley, *et ux.*, 211 U. S. 31.
Louisville & Nashville Railroad Co. v. Mottley, *et ux.*, 133 Ky. 652.

I.

FREE INTERSTATE TRANSPORTATION FORBIDDEN.

Knox v. Lee, and Parker v. Davis (Legal Tender Cases), 12 Wall. 550-51.
Bullard v. Northern Pac. R. Co., 10 Mont. 168, 45 Am. & Eng. R. Cases 234, 11 L. R. A. 246.
Newport News & M. V. Co. v. McDonald Brick Co.'s Assignee, 109 Ky. 408.
Fitzgerald v. Fitzgerald & Mallory Construction Co., 59 N. W. 862-63.
Southern Wire Co. v. St. Louis Bridge & Tunnel Railway Co., 38 Mo. App. 191.
Fitzgerald v. Grand Trunk Railroad Co. (Vt.), 22 Atl. 76, 77.
Kentucky & Indiana Bridge Co. v. Louisville & Nashville Railroad Co., 34 Am. & Eng. R. Cases 630; same v. same, 37 Fed. 567.
Gibbons v. Ogden, 9 Wheat. 1.
Addyston Pipe & Steel Co. v. United States, 175 U. S. 228.

Scranton v. Wheeler, 179 U. S. 162.
Bradford v. Jenkins, *et al.*, 41 Miss. 328, 335-37.
Rhode Island v. Massachusetts, 12 Pet. 892.
Dartmouth College v. Woodward, 4 Wheat. 494.
Armour Packing Co. v. United States, 209 U. S. 56.
Sections 4, 6 and 8, Endlich on Interpretation of Statutes.
United States v. Dickson, 15 Pet. 141-163.
United States v. Wells-Fargo Express Co., 161 Fed. 606.

II.

INTERSTATE PASSENGER TRANSPORTATION MUST BE PAID FOR IN MONEY.

Decisions of Interstate Commerce Commission relative to Railroad Passes and Free Transportation, Senate Document, No. 226, 60th Congress, First Session, Communicated to Senate February 6, 1908, page 18.

Conference Rulings of Interstate Commerce Commission, issued by order of the Commission December 28, 1909, page 57, promulgated September 15, 1906.

Chicago, Burlington & Quincy Railway Co. v. United States, Ib. 90.
Union Pacific R'y Co. v. Goodridge, 149 U. S. 690, 691.
Gulf, Colo., etc., R'y Co. v. Hefley, 158 U. S. 98.
I. C. C. v. Ches. & Ohio R'y Co., 200 U. S. 361.
Tex. & Pac. R'y Co. v. Mugg, 202 U. S. 242.
Tex. & Pac. R'y Co. v. Abilene Cotton Oil Co., 204 U. S. 439.
Poor Grain Co. v. C. B. & Q. R'y Co., 12 I. C. C. R. 418, 469.

United States v. Chicago, I. & L. Railway Co., 163 Fed. 114.

United States v. Atchison, T. & S. F. R'y Co., 163 Fed. 111.

Atchison, T. & S. F. R'y Co. v. United States, 170 Fed. 250.

State v. Martyn, 117 N. W. 719, 23 L. R. A. (N. S.) 217.

McNeill v. Durham & C. R. Co., 132 N. C. 510.

Supreme Court U. S.
FILED
JAN 9 1911
JAMES H. McKENNEY,
Clerk.

No. 246.

In the Supreme Court of the United States

October Term, 1910.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

v.

ERASMUS L. MOTTLEY and ANNIE E. MOTTLEY, his Wife,
Defendants in Error.

CLARENCE U. MCELROY,
LEWIS MCQUOWN,
Solicitors for Defendants in Error.

SYNOPSIS.

Statement..... 1

The issues..... 4

a. Sec. 1 of Act of June, 1906, does not cover this case... 6

b. Sec. 6 of Act of June, 1906, does not cover this case... 7

Construction of the Statute—

The Act of June, 1906, does not embrace, and was not intended by Congress to embrace cases like this..... 10

Even tho' the Act of June, 1906, is broad enough, and was, by Congress, intended to embrace this case, it is violation of the Constitution of the United States, and especially the Fifth Amendment, and is therefore not enforcible as against Defendants in error..... 12

Brief of Solicitor for Plaintiff in error..... 16

Conclusion..... 19

AUTHORITIES CITED.

CONSTRUCTIONS OF STATUTES.

United States v. Kirby, 74 U. S., . Wall..... 486-7

Carlisle v. United States, 16 Wall..... 153

Chew Heowing v. United States, 112 U. S..... 555

Holy Trinity Church v. United States, 143 U. S..... 457

Bate Refrigerator Co. v. Sulzberger, 157 U. S..... 37

Market Co. v. Hoffman, 101 U. S..... 116

Tuffmardt v. Rasin, 102 U. S..... 620

Cook v. United States, 138 U. S..... 181

Constitutionality of Act of 1906, as applied to this case.

Wilkinson v. Leland, 2 Pet..... 657

Osborne v. Nicholson, 13 Wall..... 654

Dubuque R. R. Co. &c. v. Richmond, 19 Wall..... 584

This case is not overruled by, but is distinguished from Addyston Pipe & Steel Co. v. United States, 175 U. S.. 136

FORMER OPINIONS.

Louisville & Nashville R. R. Co. v. E. L. Mottley, 150 Fed. Reporter..... 406

Louisville & Nashville R. R. Co. v. Mottley, 133 Ky..... 652

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Brief for Defendants in Error.

STATEMENT

This is the second time this case has been presented to this Court.

From a judgment rendered by the United States Circuit Court for the Western District of Kentucky, the Plaintiff in error appealed to this Court, and the case was dismissed for want of jurisdiction. This appeal is taken by the Plaintiff in error from the judgment of the Court of Appeals of Kentucky.

A fuller statement of the history of the litigation is rendered unnecessary, because of the exhaustive and accurate statement made by counsel for Plaintiff in error prefacing his brief.

The facts in the case are very few and simple, and the issues are clear.

In September, 1871, E. L. Mottley and his wife, Annie E. Mottley, were en route from their home in Bowling Green to Louisville, Ky., as passengers upon one of the trains of the Louisville & Nashville Railroad Company. By reason of the gross negligence of the Railroad Company's agents and servants, both Mottley and his wife were very seriously injured.

About these facts, there is no controversy.

The Railroad Company, with full knowledge of the facts, both the injury and its cause, confessed its liability. Instead of paying $10,000.00 or any other sum, at the end of two law suits or by agreement as to amount, for reasons satisfactory to itself and the Mottleys, it preferred to pay the damages and discharge its confessed obligation to them by performing services for them.

The Railroad Company had the right to make such a contract in 1871. Doubtless it was a wise thing for it to have done, from a purely financial standpoint.

The result was that the whole matter was closed by

the execution of the contract, which forms the basis of this suit for specific performance, and which is as follows:

"LOUISVILLE, KY., OCT. 2, 1871.

"The Louisville & Nashville Railroad Company, in consideration that E. L. Mottley and wife, Annie E. Mottley, have this day released said company from all damages or claims for damages for injuries received by them on the 7th of September, 1871, in consequence of a collision of trains on the road of said company at Randolph's Station, Jefferson County, Ky., hereby agrees to issue free passes on said railroad and branches, now existing or to exist, to said E. L. Mottley and wife, Annie E. Mottley, for the remainder of the present year and thereafter to renew said passes annually during the lives of said Mottley and wife, or either of them.

"THOS. J. MARTIN,

"*Vice President Louisville & Nashville Railroad Company.*

(SEAL.)

"WILLIS RANEY, *Secretary.*"

Up to January, 1907, the Railroad Company, Plaintiff in error, fully complied with its contract, and I feel sure that it is still willing to do so, provided it does not subject itself to the penalties imposed by the Act of Congress of June 29, 1906.

It seems clear to us that this contract is an *executed*, and not an *executory* contract, and should be so treated. It is as fully executed as though the Mottleys had collected of the Railroad Company $10,000.00 by suits

or by compromise, and had paid the Company $10,000.00 upon its agreement to render them services in the form of transportation for the remainder of their lives, or for any agreed period of time.

It is as fully executed as though the Mottleys had bought and paid for and had delivered to them ordinary tickets, but have not used the tickets.

No importance can possibly be attached to the words "free passes" used in the contract. The passes to be issued were only free in the sense that no other charge would be made for them, other than the price already charged and paid.

To call that a "free pass" which has been bought and paid for, in full, does not make it other than it is.

The obligation of the Railroad Company to issue to the Mottleys the *evidences* of their right to transportation is of the same effect as though the Railroad Company had, in 1871, delivered to them tickets good for the remainder of their lives.

A pass or ticket is simply an *evidence* of a right and not the *right itself*. They are simply devices used by all railroads for convenience, to show that a passenger has the right to travel on a train.

THE ISSUES.

In their declaration, filed in the Warren Circuit Court, the Mottleys do not ask free passes, or free

tickets, or free transportation, or any free thing whatsoever; they sue for the specific performance of a contract, with whose terms they have fully and completely complied nearly forty years ago.

The Railroad Company, of course, does not deny the contract; it does not deny that it has Mottley's money; it does not deny that the Mottleys have fully complied with their part of the contract, but bottoms its refusal to further specifically perform its obligations alone upon the idea that Congress has not only annulled the contract between it and the Mottleys, but has forbidden it to perform its obligations under heavy penalties, denounced by the Act of June 29, 1906, entitled, "An Act to Amend an Act, entitled an Act to Regulate Commerce, approved February 4, 1887, and all Acts Amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission."

Growing out of this act a twofold issue is presented in this record.

First, I insist that the Act of Congress in question, when fairly construed, is not intended to be retroactive, and was never intended to cover a case such as is here presented.

Second, I insist that even if the Act is retroactive, and was unmistakably intended by Congress to cover such a case as this is, then it is clearly repugnant to the Constitution of the United States and is not enforcable as against the Defendants in error.

FIRST ISSUE.

DOES THE ACT OF JUNE 29, 1906, COVER THIS CASE, AND WAS IT SO INTENDED BY CONGRESS.

The Act of June 29, 1906, was an amendment to the Act of 1887, in which new provisions were incorporated. Only two provisions of this Act, it is believed, have any bearing upon the issue presented by this case, and they are as follows:

> Section 1. . . . "No common carrier subject to the provisions of this Act shall, after January 1st, 1907, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees.
>
> . . . Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred, nor more than two thousand dollars, and any person other than the persons excepted in this provision, who uses any such interstate free ticket, free pass or free transportation, shall be subject to a like penalty." . . .

Manifestly, the sole purpose of this provision was to forbid, under penalty, all carriers from *giving* free passes, and to forbid, under like penalty, every person, not in the excepted class, from *using* such free passes. It seems that the only argument needed to show that this provision does not touch the facts of this case, and was not so intended, is to read the Bill of Complaint and read the law. Suppose Plaintiff in error had issued

passes to Col. Mottley and wife for 1907, as required by its contract of 1871, and suppose it had been indicted for so doing, and Mottley and wife had been indicted for using such passes. *Could* either be convicted? *Should* either be convicted? Is not the conviction of either legally an unthinkable proposition?

SECOND ISSUE.

DOES SECTION 6 OF ACT OF 1906 COVER THIS CASE?

But it is insisted that if Section 1 of the Act of June, 1906, does not cover a case like the one at bar, Section 6 does. That part germain says:

> "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers, or property, as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of the Act; nor shalll any carrier charge, or demand, or collect, or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs, than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner, or by any device, any portion of the fares, rates and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. . . . The willful failure upon the part of any carrier subject to said Act to file and publish

> the tariffs or rates and charges as required by said Act, or strictly to obesrve such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof, the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense."

This provision, under heavy penalties, requires at the hands of the carrier two things: First, that it shall file and publish its tariff rates, and, second, that it shall abide by such rates until legally changed. Congress, in the passage of this act, was looking to the *future*, and not to the *past*. It saw that gross evils existed in the land, saw unjust discriminations upon the part of some carriers, saw rebates given and received, saw inequalities hurtful to the country, saw favoritism injurious to the masses of the people. It desired to correct these evils and end these abuses, hence the act requiring tariff rates and requiring the charges by the carrier to be according to those rates. But did a condition such as is shown by this record, enter into the legislative mind? Was it the legislative intent to fine a carrier from $1,000 to $20,000 for issuing a ticket that had been paid for?

Counsel for Plaintiff in error says that the language of the Act is broad, and contains no exception, and if Congress had intended to have *excepted* a case like this, it would have said so. My reply is, that if Congress had intended the act to *embrace* a case like this, it would have said so, and *should* have said so, and the fact that it did not say so, is evidence conclusive that it had no such purpose.

In construing this statute, insofar as it bears upon this case, the Court is called upon to decide this clear-cut, concrete proposition: Did Congress, under power conferred upon it by the Constitution, to regulate commerce between the States, by this act to "regulate commerce," intend to annul a contract, the full consideration for which had passed? Did Congress, under the guise of an act to *regulate commerce*, intend to confiscate Mottley's property? Did Congress intend to relieve a carrier from its obligation to perform services for which, prior to the passage of the act in question it had received full and satisfactory compensation? Applying the question of intention to the facts of this case, did Congress intend that, if Col. Mottley and his wife used passes issued them under the contract of 1871, that they should each be fined from $1,000 to $20,000, and that, too, when the contract of 1871 was, when made, perfectly legal?

Counsel for Plaintiff in error, a profound lawyer, and eminent for his fairness in discussion, says:

> "Insofar as said contract remains unexecuted or unfulfilled on the part of the Plaintiff in error, the Defendants in error are remediless. They would not, it is believed, have even a right of action for damages, for Plaintiff in error has voluntarily committed no breach. . . ."

Assuming this statement to be indisputable, did Congress intend, not only to nullify a contract, valid when made to turn over to the Plaintiff in error the money which the Mottleys had paid, but also to deprive them

of all possibility of redress? And yet, if Plaintiff in error's contention is correct, this result inevitably follows.

The learned Judge of the U. S. Circuit Court well said (Federal Reporter, Vol. 150, p. 411):

> "Such invalidation could be justified upon no principle which would aid in the general purposes of the legislation, but would be a wanton infliction of an unnecessary wrong."

So I respectfully insist that Congress never intended the Act in question to be retroactive, never intended it to apply where the right of persons, other than the carriers, were involved—never intended to inflict a wrong upon the humblest of the people.

CONSTRUCTION OF STATUTES.

To hold that the Act of 1906 was never intended to reach a case like the one at bar, is not only consonant with sound principle, with common sense, and with justice, but it is believed to be fully justified by the utterances of the courts of the land.

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will also, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of that

character. The reason of the law in such cases should prevail over the letter."

United States v. *Kirby*, 74 U. S. (7 Wall.), p. 486-7.

"All general terms in the statutes should be limited in their application, so as not to lead to injustice, oppression or unconstitutional operation, if that be possible. It will be presumed that the exceptions were intended which would avoid results of that character."

Carlisle v. *United States*, 16 Wall., 153.

Chew Hevug v. *United States*, 112 U. S., 555.

Holy Trinity Church v. *United States*, 143 U. S., 457.

Bate Refrigerator Co. v. *Sulzberger*, 157 U. S., 37.

In *Market Co.* v. *Hoffman*, 101 U. S., 116, this Court says:

"In *Brewer's Lessee* v. *Bloucher* (14 Pet., 78) it was said to be the undoubted duty of the court to ascertain the meaning of the legislature, from the words used in the statute and the subject-matter to which it related, and to restrain its operation within narrower limits than its words import, if the court is satisfied that the literal meaning of the language would extend to cases which the legislature never designed to include in it."

On the subject of retroactive statutes, in *Apffmord, Jr.*, v. *Rasin*, 102 U. S. (12 Otto, 620-3), it is said: "If

it be conceded that Congress could do this, the principle is too well established to need citation of authorities, that no law will be construed to act retrospectively unless its language imperatively requires such a construction."

To the same effect is *Cook* v. *United States*, 138 U. S., 181.

Is the Act of June 29, 1906, Constitutional When Applied to a Case Like the One at Bar?

But suppose that no doubt could exist about the fact that the Act of 1906 embraced, and was indisputably intended to embrace this specific case, and all others like it—if indeed there should be any other like it in all the Union. Suppose the Act had contained another section saying that, "Wherever a carrier has heretofore received compensation for transporting a passenger for a determinable period, and the agreed time during which such carrier is obligated to so transport such passenger has not expired, said carrier is forbidden, under penalty of not less than $1,000 nor more than $20,000, from fulfilling its said contract. And if such passenger accepts from such carrier a ticket in pursuance of said contract, and uses same, he shall be liable to a like penalty. *Provided*, however, that nothing in this section shall be construed as to hold such carrier liable for damages for its failure, after the approval of this Act, to further attempt to fulfill said contract."

If such a section had been added to the Act, there

could be no doubt but that it would cover this case, and there could be no doubt as to the intenti onof Congress.

But *could* this Court, *would* this Court enforce such a law?

That Congress has vast power is conceded. It is a *potent* arm of the Government, but it is not *omnipotent.*

The humblest man in the Republic may stand behind the Constitution and say to Congress, as was said of old by the prophet: "Hitherto shalt thou come, but no further; and here shalll thy proud waves be stayed."

When a private citizen has made a lawful contract, has executed that contract fully so far as his obligation is concerned, and has parted with his money or property on the faith of the inviolability of his contract, it is no answer to his protest against the annulment of his contract and the confiscation of his property, to say that Congress has power to regulate commerce between the States, and that every corporation takes and holds its existence, knowing that Congress has power over both its existence and its methods.

What becomes of the provision of the Constitution saying, that no man shall be deprived of his property "except by due process of law," if Congress has the power by its *ipsi dixit* to legislate $1,000 or $10,000 or $1 out of the hands of Col. Mottley into the hands of the Plaintiff in error? And yet that is the effect of the Act of 1906 as applied to this case.

What becomes of the doctrine of "vested rights," the sheet anchor of private rights for more than one hundred years, if Congress has the power to specifically annul a solemn contract lawful when made?

And yet that is the effect of the Act of 1906 as applied to this case. It is true that the Constitution of the United States contains no inhibition upon Congress against the passage of laws impairing the obligation of contract; but it is none the less true that with this Court private contracts and private property have always been sacred things, almost as sacred as human liberty itself.

In *Wilkerson* v. *Leland*, 2 Pet., 657, Judge Story, speaking for this Court, said:

> "The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming the power to violate them —a power so repugnant to the common principle of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people. The people ought not to be presumed to part with rights, vital to their security and well-being without very strong and direct expression of such intent."

He added:

> "We know of no case in which a legislative act to transfer the property of A to B without his con-

sent has ever been held a constitutional exercise of legislative power in any State in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced."

In *Osborne* v. *Nicholson*, 13 Wal., 654, this Court says, in discussing the effect of the repeal of a statute:

"Rights acquired by deed, will, or contract of marriage, or other contract, executed according to statutes subsequently repealed, subsist afterwards, as they were before, in all respects as if the statutes were still in full force. This is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a floodtide of intolerable evils. It would be contrary to the general principles of law and reason, and to one of the most vital ends of government. The doctrine of the repeal of statutes, and the destruction of vested rights by implication, are alike unfavored in the law. Neither is to be admitted unless the implication is so clear as to be equivalent to explicit declaration. Every doubt should be resolved against a construction so fraught with mischief. . . . The proposition, if carried out in this case, would in effect take away one man's property and give it to another, and the deprivation would be 'without due process of law.' This is forbidden by the fundamental principles of the social compact, and is beyond the sphere of the legislative authority both of the States and the Nation."

In *Railroad Co.* v. *Richmond*, 19 Wall., 584, this Court says:

> "The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminatory State legislation; it was never intended that the power should be exercised so as to interfere with private contracts not designed at the time they were made to create imperiments to such intercourse."

So I insist that, both upon principle and authority, even though the Act of 1906 was intended to cover a case like this, it is not enforceable, because repugnant to, and violative of, both the letter and the spirit of the Federal Constitution.

BRIEF OF SOLICITOR FOR PLAINTIFF IN ERROR.

It would unduly lengthen this brief to review the excellent arguments made, and numerous authorities cited, by the solicitor for the Plaintiff in error. To the suggestion made that the case at bar falls within the first section of the Act of June 29, 1906, I can only repeat that, in furnisning the Mottleys with transportation under the contract of 1871, the Railroad Company in no possible sense can be held to furnish them with free passes. The passes furnished are not free, but bought and paid for, and it seems to me that this *fact* closes all *argument* on that point.

It is contended by counsel that the Act of 1906 should be literally construed, and that, upon its face, there are

no exceptions available for Defendants in error. But if Section 1 is literally construed, it does not cover this case as argued, because the passes are not *free* passes; nor does Section 6 apply, because it requires carriers to file and publish certain rates, for *future* use, as I insist, and further provides that no carrier shall charge, or demand, or collect, or receive a greater, or less, or different compensation for such transportation than are specified in the tariff filed. Now, in performing for the Mottleys a service for which Railroad Company was paid, before the Act of 1906 became effective, the Company makes, and can make, no charge whatsoever under the tariff it is required to file.

Recognizing the doctrine of "vested rights," as laid down by this Court, and the interpretation given to the Fifth Amendment to the Federal Constitution, counsel for Plaintiff in error says that, "While Congress may not pass an Act for the purpose of impairing the obligations of contracts, it may, in the due exercise of the powers expressly conferred upon it, incidentally do so."

In support of this contention, the Legal Tender cases and others along this line are cited. I fully recognize the doctrine laid down in these cases, but I most respectfully insist that this doctrine does not apply, and cannot apply to such a case as we have here.

At stated, the Act of 1906, so far as this controversy is concerned, does two things: It forbids a carrier to give free passes except in certain cases, it requires the carrier to file tariffs and to regulate its charges accord-

ing to these tariffs. All this looks to the future. Applied to the future, it corrects many evils, destroys many abuses, and is within the letter and spirit of the organic law. But counsel insist that the Act is more far-reaching than this, that it relates to the past as well as to the future—that it operates to annul all pre-existing contracts such as Defendants in error hold. This effect manifestly does not flow as an *incident* to the Act, but must result as a positive and substantive declaration. For, as stated above, if the Act of 1906 covers, and was intended by Congress to cover, this case, so far as it is concerned, the Act must be construed as though it related alone to this kind of a case. So, I insist that the Act must be construed as though its only provision was to annul pre-existing contracts. And, if it so read, this contract would be annulled not as an incident, but as a direct expression of the legislative will, and such a legislative declaration is inhibited by the Constitution.

A number of cases have arisen, such as *Fitzgerald* v. *Fitzgerald, etc.*, 59 N. W., Nebraska Supreme Court, which say that this Act to regulate commerce puts an end to existing arrangements and contracts, but it is believed that no court has ever yet gone so far as to hold that such a contract as exists in this case, which, as argued, is an *executed* and not an *executory* contract, which is a *contract*, where the consideration was paid in good faith, and is not a simple *traffic arrangement*, was not valid and binding. That "there can, in the nature of things, be no vested right in an existing law which precludes its change or repeal" is true only in a

modified sense. All laws may be subject to amendment or repeal, but no law can destroy the rights of a citizen, which rights were lawfully acquired under a constitutional law.

It seems that counsel lose sight of the fact that this is not a contest between the Government and the Louisville & Nashville Railroad Company, in which the company questions the power of Congress to pass a law for the regulation of its conduct as to passengers and freight, but it is a contest between the Mottleys and the company, wherein they seek to enforce a contract valid when made, and which, as stated, so far as they are concerned, was fully executed before the Act of 1906 was passed. They are seeking simply a delivery to them of that which they have bought and paid for. If they are adjudged their property, they only get what they paid for; if they are denied what they paid for, the Railroad Company is given their property by a simple legislative declaration. If this be "due process of law," as expounded by the "Fathers," I confess my amazement.

CONCLUSION.

So far as the Defendants in error are concerned, the amount involved in this case is not essential to their comfort or happiness. They are both walking amid the lengthening shadows of the eventide, and, in the course of nature, it cannot be long before they will enter upon their final journey over a road, not regulated by either Act of Congress or decree of the Intersetate Commerce

Commission. The Railroad Company has, with the utmost courtesy and good faith, hitherto carried out its part of the contract of 1871, and, as I believe, would continue to do so if not inhibited by a law not of its seeking.

I do not think that any of the cases cited by counsel for the Railroad Company from Nebraska and other States are decisive of the case at bar; at most they are simply persuasive; the facts upon which they rest are different from the facts we have in this case, and the principles applicable to these cases are not applicable to this case. Here, as against them, I confidently refer the Court to the clear and lucid opinions delivered in this identical case and reported in 150 Fed. Rep., p. 406. Also to the opinion of the Kentucky Court of Appeals, reported in 133 Kentucky Reports, p. 652, which is an opinion concurred in by the entire membership of that high and able Court.

So the interest which attaches to the decision of this case, so far as the parties are concerned, and so far as the Interstate Commerce Commission is concerned, springs from the principle involved rather than the amount. It is another of many cases which have arisen wherein this Court is called upon to *mark again* the limits of Congressional power, and to *define again* those rights of the individual which are sacred under the law, and which neither the executive, legislative nor judicial arm of the government can arbitrarily infringe or destroy.

An affirmance of the judgment of the Warren Circuit Court and of the judgment of the Kentucky Court of Appeals is most respectfully asked.

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